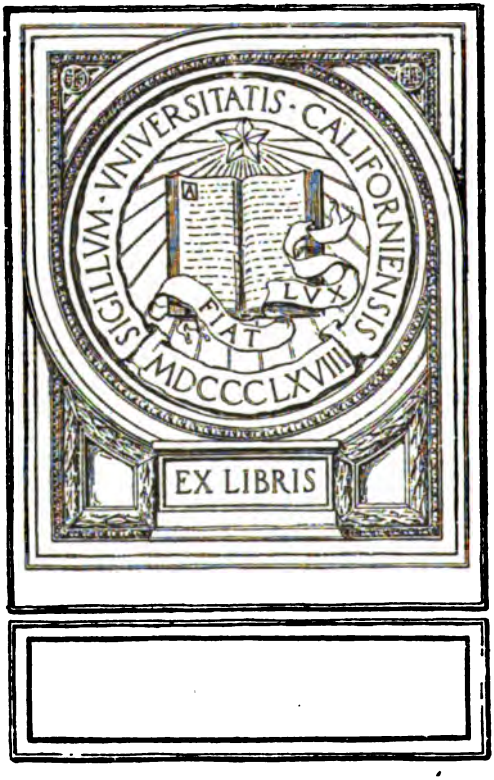
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STUDENTS LEADING CASES AND STATUTES ON INTERNATIONAL LAW

ARRANGED AND EDITED WITH NOTES BY

NORMAN BENTWICH

OF LINCOLN'S INN BARRISTER-AT-LAW
AUTHOR OF "THE DECLARATION OF LONDON" "THE LAW OF DOMICILE AND SUCCESSION"

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PREFACE

THIS book is primarily designed for students who are starting on the study of international law; and it is meant to be used as a companion to the principal English text-books. No attempt has been made to render it sufficient in itself, or to link up the leading cases with such an amount of commentary as would render the use of a text-book unnecessary. In this respect the collection of cases differs from that made by Mr. Pitt-Cobbett, and it differs also in that it gives the *ipsissima verba* of the judges, in place of a digest or summary of their judgments. Many of the decisions are indeed abridged, but it is hoped that the material parts which deal with points of international law have always been given. It is very desirable that the student should become acquainted as early as possible with the way in which questions of international law are dealt with by the Courts, and that he should study not only the results of the cases but the methods by which the results are reached. There exists already a well-known selection of international law cases in English, based on this principle. It is that originally made by Professor Snow and subsequently edited and enlarged by Professor J. B. Scott of the George Washington University. For two reasons, however, the book is not altogether suitable for English students; it is somewhat large, and the selection is primarily made from American decisions. Although the judgments of international law by the nature of their subject should not differ fundamentally in different national jurisdictions, there is an obvious advantage to the student in studying the subject as it has been expounded by the Courts of his own country. I have, therefore, made my selection as far as possible from the English cases, and I have used American cases only to

supplement the English or to fill a gap in the chain of English authority. I have also thought it best to exclude statements and opinions on international law which have not the form or the force of judicial decisions. Such sources of the law are amply dealt with in the text-books, and they have not the same educational value as a judgment arrived at after litigation in a particular case. I have included, on the other hand, citations from the awards in several international arbitrations to which England has been a party, because the decisions of international tribunals are in a very complete sense leading cases in international law. Similarly I have included the material parts of several English statutes declaratory of international law as applied in England, because it is not always easy for the students to find these statutes, and they are too, in a full sense, binding authorities. The law of war has been treated less fully than the law of peace, because only a division of it is the subject of judicial decision. Moreover that division is now in large part codified, and many judicial decisions given before the codification are therefore of doubtful importance.

I have endeavoured to classify the cases in groups of three or more which illustrate different aspects of the same subject, and in the notes I have given references to decisions which bear upon the same question or suggest a different view. Save in one or two cases, where it did not seem necessary, I have prefixed to the judgment a headnote and a summary statement of the facts. And at the head of each division of the subject I have given the references to the sections or pages of the principal English text-books on international law which are used by students.

Lastly I desire to thank very sincerely my friend Professor Oppenheim, Whewell Professor of International Law at Cambridge University, who has had the kindness to look through this book in proof, to make many helpful suggestions, and to write an introductory note which imparts to it more authority than the editor could have given.

CAIRO, *Feb.* 28*th*, 1913.

INTRODUCTORY NOTE

My friend Mr. Norman Bentwich, the author of this excellent Case Book on International Law, was anxious that a teacher should look through the proofs in order to ascertain whether the book could be used with profit by young students. Although I consider that Mr. Bentwich, who has enriched the literature on International Law by several excellent contributions, possesses sufficient authority to judge for himself the value of his book, I have complied with his wish, and it gives me much pleasure to say that this Case Book is admirable from every point of view and may be specially recommended to be used by young students in conjunction with their lectures and their reading of text-books. The number of hours which are available in English Universities and Law Schools for a course of lectures on International Law are not sufficient to discuss cases in detail, and for this reason the study of cases is almost invariably left to private reading. Of course, the ideal is that the cases should be read in the Reports, but young students frequently have neither the Reports at hand nor sufficient time to go from Report to Report and pick out the cases of interest to them. Hence it is of the greatest importance that students should possess a selection of cases within a small compass which would enable them to read the leading cases along with their lectures on International Law.

In this connection some remarks concerning the value of municipal cases for the study of International Law may not be superfluous. International Law being a law between States, Municipal Courts by their decisions can neither directly call a rule of International Law into existence, nor take the life out of a recognized rule of International Law. It is the Governments of

the civilized States which, either expressly by a law-making treaty or customarily in their intercourse with one another, create rules of International Law. Furthermore, in their administration of justice Municipal Courts cannot apply a rule of International Law unless, and in so far as, such rule has been adopted into their Municipal Law either by a special Act of the legislature, or by custom, or implicitly. If Municipal Courts find that a certain rule of International Law has not been so adopted, they cannot apply it; and if they find that their Municipal Law contains a rule which is in indubitable conflict with a rule of International Law, they must ignore the latter and apply the former. But it is obvious that the several States, in order to fulfil their international obligations, are on the one hand compelled to adopt certain rules of International Law into their Municipal Law, and on the other hand are prevented from having such rules in their Municipal Law as are in conflict with the recognized rules of International Law. And here is the point where the importance of Municipal case law for students of International Law becomes apparent.

International Law is still to a great extent a book law, a law the rules of which are abstracted by the writers of treatises from the practice of the States in their intercourse with one another. Since the character of the Family of Nations as a body of sovereign States excludes the existence of a central political authority above the sovereign States which could enforce the application of the rules of International Law, this law naturally lacks that particular sanction which Municipal Law possesses, and for this reason it is frequently maintained that International Law is not law at all. Now the practice of the Courts of his country shows to a student that International Law is real law, and that it finds application in every-day life. Thus by reading British cases concerning rules of International Law the student's attention is continuously drawn to the fact that innumerable rules of International Law are applied by British Courts, and the necessity and value of the study of International Law is thereby placed beyond all doubt.

On the other hand, the study of practical cases enlivens the

abstract rules which are taught in lectures and books. The cases, so to say, supply the flesh for the skeleton offered by lectures and treatises. By reading the cases a student watches the Courts in their interpretation of the rules of International Law, in their manner of drawing consequences from these rules, in their endeavour to fit the abstract rules to the concrete cases. The student observes that the Courts apply rules of International Law in the same way as they apply rules of Municipal Law, and thereby he must become convinced that the rules of International Law are capable of application with the same exactitude of method as rules of Municipal Law.

At the present time this conviction is of particular importance on account of the cleavage between what on another occasion[1] I have called the legal and diplomatic schools of International jurists. The diplomatic school considers International Law to be, and prefers it to remain, rather a body of elastic principles than of firm and precise rules, and opposes the establishment of International Courts of Justice because it considers the diplomatic settlement of international disputes, and failing this arbitration, preferable to the international administration of justice by international Courts. The legal school, on the other hand, desires International Law to develop more or less on the lines of Municipal Law, aiming at the formulation, if not codification, of firm, decisive, and unequivocal rules of International Law, and working for the establishment of International Courts for the purpose of the administration of international justice by permanently appointed independent judges trained in the law. He who watches the development of affairs with a critical eye, cannot doubt that the future belongs to the legal school of international jurists. The rules of International Law now require such an authoritative interpretation and administration as only Courts of Justice can supply. If we desire more harmony and less strife, many a rule of International Law must be made firmer, more decisive, and more unequivocal than hitherto, and the establishment

[1] See my treatise on International Law, vol. i. (second edition, 1912), p. 82 (5)

of International Courts would greatly assist in this development. Municipal Courts, and British Courts in especial, have in the past greatly assisted in shaping many of the rules of International Law, but there are a number of rules which, by their nature, can never come within the range of Municipal Courts; it is only International Courts which can subject such rules of International Law to adequate treatment.

L. OPPENHEIM

Cambridge, February 14, 1913

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INTERNATIONAL LAW CASES.

I. THE LAW OF PEACE.

CHAPTER I.

THE NATURE OF INTERNATIONAL LAW.

See Oppenheim, ss. 9 and 12 ; Hall, p. 16 ; Westlake, pp. 5 and 17.

WEST RAND CENTRAL GOLD MINING COMPANY, LIMITED, v. THE KING.

Law Reports (1905), 2 K.B.D. 391 ; 74 L.J. K.B. 753.

The nature of International Law and the extent to which it forms part of the law of England.

Case.—A petition of right alleged that before the outbreak of war between the late South African Republic and Great Britain, gold, the produce of a mine in the republic owned by the suppliants, had been taken from the suppliants by officials acting on behalf of the government of the republic ; that the government by the laws of the republic was liable to return the gold or its value to the suppliants ; and that by reason of the conquest and annexation of the territories of the republic by her late Majesty, the obligation of the government of the republic toward the suppliant in respect of the gold was now binding upon His Majesty the King.

In the course of his judgment Lord Alverstone (L.C.J.) discussed the propositions put forward by the suppliant that international law was part of the law of England, and that by international law the conquering State had to discharge the liabilities of the conquered State :

Judgment.—Lord Robert Cecil [1] argued that all contractual obligations incurred by a conquered State, before war actually breaks out, pass upon annexation to the conqueror, no matter what was their nature, character, origin, or history. He could not indeed do otherwise, for it is clear that if any distinction is to be made it must be made upon grounds which, without depriving the original liability of its character of a legal obligation against the vanquished State, make it inexpedient for the conquering State to adopt that liability as against itself; in other words, upon ethical grounds, into which enter considerations of propriety, magnanimity, wisdom, public duty, in short, of policy, in the broadest and widest sense of the word. It is equally clear that these are matters with which municipal Courts have nothing to do. They exist for the purpose of determining and enforcing legal obligations, not for the purpose of dividing them into classes, and saying that some of them, although legally binding, ought not to be enforced. The broad proposition which thus formed the basis of Lord Robert Cecil's argument almost answers itself, for there must have been, in all times, contracts made by States before conquest such as no conqueror would ever think of carrying out. His main proposition was divided into three heads. First, that, by international law, the sovereign of a conquering State is liable for the obligations of the conquered; secondly, that international law forms part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered State, must be protected and can be enforced by the municipal Courts of the conquering State.

In support of his first proposition Lord Robert Cecil cited passages from various writers on international law. In regard to this class of authority it is important to remember certain necessary limitations to its value. There is an essential difference, as to certainty and definiteness, between municipal law and a system or body of rules in regard to international conduct, which, so far as it exists at all (and its existence is assumed by the

[1] Counsel for the suppliants.

phrase "international law"), rests upon a consensus of civilised States, not expressed in any code or pact, nor possessing, in case of dispute, any authorised or authoritative interpreter; and capable, indeed, of proof, in the absence of some express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history. It is obvious that, in respect of many questions that may arise, there will be room for difference of opinion as to whether such a consensus could be shown to exist. Perhaps it is in regard to the extra-territorial privileges of ambassadors and in regard to the system of limits as to territorial waters, that it is least open to doubt or question. The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilised nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se*, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, "law." The reference which these writers not infrequently make to stipulations in particular treaties as acceptable evidence of international law is as little convincing as the attempt, not unknown to our Courts, to establish a trade custom which is binding without being stated, by adducing evidence of express stipulations to be found in a number of particular contracts.

The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and

applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration: "What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilised States have agreed shall be binding upon them in their dealings with one another."

In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants. For instance, *Barbuit's Case*, Cas. t. Tal. 281; *Triquet* v. *Bath*, 3 Burr. 1478; and *Heathfield* v. *Chilton*, 4 Burr. 2016, are cases in which the Courts of law have recognised and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield, when dealing with the particular and recognised rule of international law on this

subject, that the law of nations forms part of the law of England ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her Courts. The cases of *Wolff* v. *Oxholm*, 6 M. & S. 92 ; 18 R.R. 313, and *Reg.* v. *Keyn*, 2 Ex. D. 63, are only illustrations of the same rule—namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law.

Note.—The doctrine here laid down as to the necessity of international law being definitely accepted by this country through a treaty or a statute or a decision of the judges before the Courts can take note of it has been criticised. Dr. Westlake, commenting on the case, said in the *Law Quarterly Review* (xxii. January 1906): "English Courts must enforce the legal rights given by international law as well as those given by the law of the land so far as they fall within their jurisdiction in respect of parties or place." And it is submitted that in some cases custom, as declared by the text writers, may be binding on the Courts in the same way as mercantile custom when proved is binding.

The American Courts undoubtedly more willingly adopt general international custom as declared by jurists. In a recent American case, *The Paquette Habana* (175 U.S. 677), decided by the Supreme Court in 1899, the recognition of international law as part of the law of the land was very clearly enunciated. The case involved the question whether, in the absence of municipal law, the principle that fishing smacks belonging to an enemy are not subject to seizure had become so well recognised in international law as to warrant the Courts in declaring illegal a capture made by the United States naval forces. In its opinion the Court, holding that by international law the seizure was illegal, say :

"International law is part of our law, and must be ascertained and administered by the Courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations, and, as evidence of these, to the works of jurists and commentators, who by years of labour, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is,

. . . . This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilised nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize Courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter."

THE QUEEN v. KEYN (THE FRANCONIA).

L.R. 2, Ex. D. 63; 46 L.J. M.C. 17.

Court of Crown Cases Reserved 1876.

Case.—This was a criminal case in which the accused, who was the master of a German steamer, was charged with manslaughter of a British subject by the negligent management of his vessel, which led to a collision that caused the deceased's death. The collision took place in the Straits of Dover within three miles of the English coast, and it was contended for the Crown that therefore the offence was committed within the realms of England and was triable by an English Court.

The point was submitted to the Court of Crown Cases Reserved, which by seven judges to six held that the English Court had not jurisdiction. In the course of his judgment Cockburn, C.J., having considered and rejected the theory that the littoral sea

beyond the low-water mark did not originally form part of the territory of the realm, turned to the proposition put forward on behalf of the Crown that the three-mile zone (bordering the coast) was by international law territorial water. He analysed the nature of international law in the following passage, which is one of the *loci classici* on the subject:

Judgment.—"Can a portion of that which was before high sea have been converted into British territory without any action on the part of the British Government or legislature—by the mere assertion of writers on public law—or even by the assent of other nations? And when in support of this position or of the theory of the three-mile zone in general, the statements of the writers on international law are relied on, the question may well be asked, upon what authority are these statements founded?

"When and in what manner have the nations, who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it? to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given.

"For, even if entire unanimity had existed in respect of the important particulars to which I have referred in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilised nations of the world.

"For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage—an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign State they are subject to the local law as well as to that of their own country. In the absence of proof of assent, as derived from one or other of these sources,

no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law, but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.

"When I am told that all other nations have assented to such an absolute dominion on the part of the littoral State, over this portion of the sea, as that their ships may be excluded from it, and that, without any open legislation, or notice to them or their subjects, the latter may be held liable to the local law, I ask first what proof there is of such assent as here asserted; and, secondly, to what extent has such assent been carried; a question of infinite importance when, undirected by legislation, we are called upon to apply the law on the strength of such assent. It is said that we are to take the statements of the publicists as conclusive proof of the assent in question, and much has been said to impress on us the respect which is due to their authority, and that they are to be looked upon as witnesses of the facts to which they speak, witnesses whose statements, or the foundation on which those statements rest, we are scarcely at liberty to question. I demur altogether to this position. I entertain a profound respect for the opinion of jurists when dealing with the matters of judicial principle and opinion, but we are here dealing with a question not of opinion but of fact, and I must assert my entire liberty to examine the evidence and see upon what foundation these statements are based."

In the same case Lord Coleridge (C.J.), who dissented from the opinion of the majority of the Court, dealt with the binding character of international law. Laying down that in his opinion the offence was committed in English territory and that it was impossible to hold that England ended with low-water mark, he continued:

"I do not, of course, forget that it is freely admitted to be within the competency of Parliament to extend the realm how far soever it pleases to extend it by enactments, at least so as to bind the tribunals of the country; and I admit equally freely that no statute has in plain terms, or by definite limits, so extended it.

"But, in my judgment, no Act of Parliament was required. The proposition contended for, as I understand, is that for any act of violence committed by a foreigner upon an English subject within a few feet of low-water mark, unless it happens on board a British ship, the foreigner cannot be tried, and is dispunishable. . . .

"By a consensus of writers, without one single authority to the contrary, some portion of the coast-waters of a country is considered for some purposes to belong to the country the coasts of which they wash. . . .

"This is established as solidly as, by the very nature of the case, any proposition of international law can be. Strictly speaking, international law is an inexact expression, and it is apt to mislead if its inexactness is not kept in mind. Law implies a law-giver, and a tribunal capable of enforcing it and coercing its transgressors.

"But there is no common law-giver to sovereign States and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilised States have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and acts of State are but evidence of the agreement of nations, and do not, in this country at least, *per se*

bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English Courts give effect, as part of English law, to such agreement. . . .

"We find a number of men of education, of many different nations, most of them uninterested in maintaining any particular thesis as to the matter now in question, agreeing generally for nearly three centuries in the proposition that the territory of a maritime country extends beyond low-water mark.

"I can hardly myself conceive stronger evidence to show that, as far as it depends on the agreement of nations, the territory of maritime countries does so extend. . . .

"If the matter were to be determined for the first time, I should not hesitate to hold that civilised nations had agreed to this prolongation of the territory of maritime States, upon the authority of the writers who have been cited in this argument as laying down the affirmative of this proposition. . . ."

Note.—The question in this case was settled by the Territorial Waters Jurisdiction Act, 1878. (*See below*, p. 56.)

THE SCOTIA.

SUPREME COURT OF THE UNITED STATES, 1871.

14 Wallace, 170.

General Principles of International Law of the Sea.

Judgment (Strong, J.).—. . . "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilised communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime States,

or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single State, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the first system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan Table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, expressed or understood, of maritime nations?

"When, therefore, we find such rules of navigation as are mentioned in the British Orders in Council of January 9, 1863, and in our Act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial States of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place.

"This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must, indeed, be proved as facts, but it is not so with the law of nations."

Note.—In this case the American Court applied the navigation regulations which were adopted by most of the civilised nations, to a case of collision before it. American Courts have likewise often applied British prize-law as declaring the international law. In *The Nereide* (9 Cr. 388) Marshall, C.J., declared: "Till an Act [of Congress] be passed, the Court is bound by the law of nations, which is a part of the law of the land." And in *Hilton* v. *Guyot* (159 U.S. 113) the United States Supreme Court said:

"International law in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominion of another nation—is part of our law, and must be ascertained and administered by the Courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination. The most certain guide, no doubt, for the decisions of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them."

International Law and Municipal Law.

Cf. Oppenheim, chap. i. secs. 20–25; Lawrence, chap. i. sec. 9.

MORTENSEN v. PETERS.

14 Scot. L.T.R. 227; (1906) 8 Fraser 93.

The national Courts cannot modify the clear construction of a Statute by reason of doctrines of international law not expressly binding on them.

Case.—The appellant, who was the master of a steam-trawler registered in Norway, was convicted of a breach of the Scotland Fishery Act for having used a method of trawling prohibited by the regulations under that Act in a part of the Moray Firth more than three miles from the shore. He objected that he was

not subject to the jurisdiction of the Scottish Court, and, further, that the prohibition of the statute could not apply to him because by international law the littoral State could (apart from special conventions) only make regulations binding on foreigners to a distance of three miles from the shore. The statute must therefore be construed subject to the rules of international law. The Full Court of the High Court of Justiciary dismissed the appeal, holding that the absolute prohibition in a British statute against doing a thing in a defined area must be held by a municipal Court to be binding on every one within that area irrespective of nationality and irrespective of the limitations which international law put upon the territorial sovereignty.

Judgment.—The Lord-Justice-General, dealing with the relations of municipal and international law, said:

"It is not disputed that if the appellant had been a British subject in a British ship he would have been rightly convicted. Further, in the case of *Peters* v. *Olsen*, when the person convicted, as here, was a foreigner in a foreign ship, the conviction was held good. The only difference in the facts in that case was that the locus there was, upon a certain view of the evidence, within three miles of a line measured across the mouth of a bay, where the bay was not more than ten miles wide, which cannot be said here. But the conviction proceeded on no such consideration, but simply on the fact that the locus was within the limit expressly defined by the schedule of the sixth section of the Herring Fishery Act; and the three learned judges in that case did, I think, undoubtedly consider and decide the question, whether the sixth section of the Herring Fishery Act (which in this intention is the same as the seventh) was, or was not, intended to strike at foreigners as well as British subjects. But as this is a full bench, we are at liberty to reconsider that decision.

"My Lords, I apprehend that the question is one of construction and of construction only. In this Court we have nothing to do with the question of whether the legislature has or has not done what foreign Powers may consider a usurpation in a ques-

tion with them. Neither are we a tribunal sitting to decide whether an act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms. The counsel for the appellant advanced the proposition that statutes creating offences must be presumed to apply (1) to British subjects, and (2) to foreign subjects in British territory; but that, short of express enactment, their application should not be further extended. The appellant is admittedly not a British subject, which excludes (1); and he further argued that the *locus delicti*, being in the sea beyond the three-mile limit, was not within British territory; and that consequently the appellant was not included in the prohibition of the statute. Viewed as general propositions the two presumptions put forward by the appellant may be taken as correct. This, however, advances the matter but little, for, like all presumptions, they may be redargued, and the question remains whether they have been redargued on this occasion.

"The first thing to be noted is that the prohibitions here, a breach of which constitutes the offence, is not an absolute prohibition against doing a certain thing, but a prohibition against doing it in a certain place. Now, when a legislature, using words of admitted generality—'It shall not be lawful,' &c., 'Every person who,' &c.—conditions an offence by territorial limits, it creates, I think, a very strong inference that it is for the purposes specified, assuming a right to legislate for that territory against all persons whomsoever. This inference seems to me still further strengthened when it is obvious that the remedy to the mischief sought to be obtained by the prohibition would be either defeated or rendered less effective if all persons whomsoever were not affected by the enactment. It is obvious that the latter consideration applied in the present case. Whatever may be the views of any one as to the propriety or expediency of stopping trawling, the enactment shows on the face of it that it contemplates such stopping; and it would be most

clearly ineffective to debar trawling by the British subject while the subjects of other nations were allowed so to fish.

"It is said by the appellant that all this must give way to the consideration that international law has firmly fixed that a locus such as this is beyond the limits of territorial sovereignty; and that consequently it is not to be thought that in such a place the legislature could seek to affect any but the king's subjects.

"It is a trite observation that there is no such thing as a standard of international law, extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland. Now can it be said to be clear by the law of Scotland that the locus here is beyond what the legislature may assert right to effect by legislation against all whomsoever for the purpose of regulating methods of fishing?

"I do not think I need say anything about what is known as the three-mile limit. It may be assumed that within the three miles the territorial sovereignty would be sufficient to cover any such legislation as the present. It is enough to say that that is not a proof of the counter proposition that outside the three miles no such result could be looked for. The locus, although outside the three-mile limit, is within the bay known as the Moray Firth, and the Moray Firth, says the respondent, is *intra fauces terræ*. Now, I cannot say that there is any definition of what *fauces terræ* exactly are. But there are at least three points which go far to show that this spot might be considered as lying therein.

"(1) The dicta of the Scottish institutional writers seem to show that it would be no usurpation, according to the law of Scotland, so to consider it.

"(2) The same statute puts forward claims to what are at least analogous places. If attention is paid to the schedule appended to sec. 6, many places will be found far beyond the three-mile limit, *e.g.* the Firth of Clyde near its mouth. I am not

ignoring that it may be said that this in one sense is proving *idem per idem*, but none the less I do not think the fact can be ignored.

"(3) There are many instances to be found in decided cases where the right of a nation to legislate for waters more or less landlocked or land-embraced, although beyond the three-mile limit, has been admitted.

"It seems to me, therefore, without laying down the proposition that the Moray Firth is for every purpose within the territorial sovereignty, it can at least be clearly said that the appellant cannot make out his proposition that it is inconceivable that the British legislature should attempt for fishery regulation to legislate against all and sundry in such a place."

Note.—The Courts are bound to apply the municipal law even if conflicting with international law, though there is a presumption against such conflict. But the Order of the Court will not be enforced if the Powers whose subjects are affected by the conflict protest against the extension of national sovereignty. Thus in the case here quoted the Norwegian was released, and no attempt was made afterwards to enforce the law upon Norwegian vessels.

For the question of the sovereignty of the littoral State over territorial bays to a distance beyond three miles from the shore *see* chapter vi., p. 60 ff.

CHAPTER II.

CLASSIFICATION OF STATES.

Oppenheim, sec. 65; Lawrence, secs. 38 and 91; Westlake, pp. 21–25; Hall, pp. 27–28.

THE "CHARKIEH," 1873.

L.R. 4, Admiralty and Ecclesiastical Courts, 59; 42 L.J. Adm. 17.

The conditions of international existence as a separate State.

Case.—This was an action of damage brought by the owners of the s.s. *Batavier* against the screw s.s. *Charkieh*. A petition on protest was filed stating that the *Charkieh* was a public vessel belonging to the Khedive as reigning sovereign of Egypt and was therefore not liable to arrest. The Court considered the status of Egypt and held that the Khedive was not entitled to the privilege of a sovereign prince. In the course of his judgment Sir Robert Phillimore said:

Judgment.—"What were the relations at this epoch existing between the Khedive and the Porte, and what was the nature and character of the authority of the former, so far as foreign States are connected with these considerations? Did they entitle the Khedive to the privilege of the sovereign of an independent State? These are questions which must be answered, like all others appertaining to international jurisprudence, by a reference to usage, authority, and the reason of the thing.

"Many accredited writers and jurists have drawn a distinction, which seems not to have escaped the framer of the Khedive's

petition on protest now before me, between a sovereignty absolute and pure and that less complete and perfect dominion to which the name of half-sovereignty (*demi-souverain*) has been given. I am inclined to think that the sovereign of a State in the latter category may be entitled to require from foreign States the consideration and privileges which are unquestionably incident to the sovereign of a State who is in the former category. There are also certain acts of feudal homage, or, as jurists say, *servitutes juris gentium*, which do not disentitle the State obliged to them to an international existence as a separate State.

"It may be that if such a *status* existed *de facto*, it would not be the province of the tribunals of a foreign State to look beyond the fact or to inquire minutely or at all into the history of its establishment. International law has no concern with the form and character of the powers of a State if through the medium of government it has such an independent existence as to render it capable of entertaining international relations with other States. . . ."

After considering the history of Egypt, the learned judge continued:

"The result, then, of the historical inquiry as to the status of his Highness the Khedive is as follows: That in the firmans, whose authority upon this point appears to be paramount, Egypt is invariably spoken of as one of the provinces of the Ottoman Empire. That the Egyptian army is regulated as part of the military force of the Ottoman Empire. That the taxes are imposed and levied in the name of the Porte. That the treaties of the Porte are binding upon Egypt, and that she has no separate *jus legationis*. That the flag for both the army and the navy is the flag of the Porte.

"All these facts, according to the unanimous opinion of accredited writers, are inconsistent and incompatible with those conditions of sovereignty which are necessary to entitle a country to be ranked as one among the great community of States.

"Against this array of negative proof is to be set the solitary circumstance that the office of Khedive is hereditary. It requires but little consideration to see that this peculiarity cannot affect the question. Egypt remains a province of an empire, and does

not become an empire because her Viceroy is hereditary. The Viceroy does not become a sovereign prince because his sovereign permits him to transmit the Viceroyalty to his descendants in the direct male line. The hereditary character does not confer on the holder, in this case, the right of making war and peace, of sending an ambassador, or of maintaining a separate military or naval force, or of governing at all, except in the name and under the authority of his sovereign.

"The hereditary character of the Viceroyalty may make the Viceroy the chief subject of the Porte, but he is still a subject prince and not a sovereign prince or 'reigning sovereign' even 'of a semi-sovereign State,' according to the terms of the petition on protest."

Note.—Egypt has perhaps changed her international status since this decision was pronounced, though what exactly is her position to-day it is hard to say. But the decision is still notable as illustrating the rules: (1) That the monarch of a semi-sovereign State enjoys the privileges which, according to the Law of nations, the municipal law of the different States must grant to the rulers of foreign States (*see below, p.* 111 ff.); and (2) that a vassal State is considered as a mere portion of the suzerain State. In the recent case of *Statham* v. *Statham and H.H. the Gaekwar of Baroda* (L. R. 1912, Probate 92) it was held however that the ruler of a vassal State does not, by placing himself under the protection of a suzerain, divest himself of the right of government and sovereignty and does not cease to rank among the sovereigns who acknowledge no other law than the law of nations, so that he cannot be made a co-respondent to a divorce suit in England.

PROTECTORATES.

Oppenheim, ss. 92–94; Lawrence, s. 43; Westlake, p. 22; Hall, pp. 27–28.

THE IONIAN SHIPS, 1857.

Spink's Cases, p. 193.

The character of protected States: The subjects of a protected country do not necessarily become enemies of the enemies of the protecting State.

Case.—Two ships flying the flag of the Ionian States were seized by British cruisers during the Crimean War on the ground

that, being British subjects, they were illegally trading with the enemy. The Ionian Islands had been placed by the Treaty of Paris, and were at the time, under the protectorate of Great Britain, and on the case coming before the Prize Court the question of the status of the inhabitants of the Ionian Islands was first considered. Dr. Lushington finally held that they were not British subjects and that their trading was not illegal.

Judgment.—After dealing with the first article of the Treaty which declares the islands a free and independent State, the judgment continued :

" The second article is one of great importance, the declaration that the State shall be placed under the immediate and exclusive protection of the King of Great Britain. I am strongly inclined to think that the necessary and inevitable consequence of such a condition is that the King of Great Britain has the right of making war and peace : indeed such a Power is inseparable from protection ; for how could the act of protection be fulfilled without such a right ? And how could the Ionian Islands be secured from aggression but by the exercise of that power ? But it is another and wholly different question whether, in consequence of the protectorate right, the Ionian States became *ipso facto* the enemies of all or any Power or Powers with which Great Britain may happen to be at war ; and it is also another and different question whether, if Great Britain were, on account of the Ionian grievances alone, to adopt measures for their protection against any other State, the kingdom of Great Britain would necessarily be at war with that State."

Note.—There is a radical difference between the status of foreign civilised countries under the tutelage of a stronger Power and that of uncivilised or semi-civilised countries which are placed under the protection of a European State, though both are called Protectorates. But certain incidents are common to both, and among them is the fact that their inhabitants do not assume the character of subjects of the protecting State. (*See* the next case.)

REX v. CREWE (EARL OF); EX PARTE SEKGOME.

L.R. 1910; 2 K.B. 576; 79 L.J. K.B. 874.

The inhabitants of a protectorate are not British subjects and do not owe allegiance to the King.

Case.—The question in this case was whether a writ of habeas corpus could issue from the English Court to determine the legality of the detention of a native chieftain in a British protectorate, and the point was argued whether the chieftain was a British subject.

Kennedy, L.J., in giving judgment, said on this point:

"Upon the first question, namely, whether Sekgome is or is not a British subject, I think that the latter view is correct. Sekgome was born and has remained a member of a native African tribe called the Batawana tribe, dwelling in a region which has for some years become officially entitled "The Batawana Native Reserve," near Lake Ngami, within the Bechuanaland Protectorate. Now the features of Protectorates differ greatly, and of this a comparison of the British Protectorates of native principalities in India, the British Protectorate of the Ionian Islands between 1815 and 1864, the Protectorate of the Federated Malay States, and the Bechuanaland Protectorate as constituted by the Orders in Council and Proclamation before mentioned, affords ample illustration. Other instances of Protectorates will be found in Wheaton, International Law, 4th ed., pp. 51–66. The one common element in Protectorates is the prohibition of all foreign relations except those permitted by the protecting State. Within a Protectorate, the degree and the extent of the exercise by the protecting State of those sovereign powers which Sir Henry Maine has described (International Law, p. 58) as a bundle or collection of powers which may be separated one from another may and in practice do vary considerably. In this Bechuanaland Protectorate every branch

of such government as exists—administrative, executive, and judicial—has been created and is maintained by Great Britain. What the idea of a Protectorate excludes and the idea of annexation, on the other hand, would include, is that absolute ownership which was signified by the word 'dominium' in Roman law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country; and this being so, the inhabitants of a Protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected State become subjects of the protecting State. As Dr. Lushington said in regard to the inhabitants of the Ionian States, then under a British Protectorate, in his judgment in the *Ionian Ships* (*see above*, p. 19), 'allegiance in the proper sense of the term undoubtedly they do not owe; because allegiance exists only between the sovereign and his subjects, properly so called, which they are not.' A limited obedience the dwellers within a Protectorate do owe, as a sort of equivalent for protection; and in the present case the Orders in Council relating to the Bechuanaland Protectorate and the proclamations of the High Commissioner made thereunder imply the duty of obedience on the part of Sekgome and other persons within the area of the Protectorate to a practically unlimited extent."

Note.—Protectorates hold an anomalous position in the society of nations, and these two cases illustrate the curious position in which their subjects may be placed with reference to the protecting State. They do not become subjects of the protecting State, and in case of war they are not necessarily involved. The protected State, though it lacks many of the features of sovereignty, yet retains a position of its own within the family of nations.

CHAPTER III.

CHANGES IN THE CONDITIONS OF INTERNATIONAL PERSONS.

Oppenheim, ss. 76–79; Lawrence, s. 48; Hall, p. 21; Westlake, p. 58.

THE "SAPPHIRE," 1870.

U.S. Supreme Court (11 Wall 164).

A reigning sovereign may sue in the courts of another country: and a suit brought by him does not abate on his deposition, but the Republic which succeeds him in the government is substituted as of right in the proceedings.

Case.—An American ship, the *Sapphire*, collided in 1867 with the French transport *Euryale* in the harbour of San Francisco, and did it damage. A libel was filed in the American Courts in the name of Napoleon III., Emperor of the French, and a sum of $10,000 was awarded as damages. An appeal was taken to the Supreme Court, and before it was heard the Emperor had been deposed. It was argued before the Supreme Court: (1) That a reigning sovereign could not sue in a foreign country; (2) that even if the suit was rightly brought, it had abated by the deposition of the Emperor. The Court rejected both these pleas and upheld the award of damages. Mr. Justice Bradley, delivering judgment, said:

Judgment.—"A foreign sovereign, as well as any other foreign person who has a demand of a civil nature against any person here,

may prosecute it in our Courts. To deny him the privilege would manifest a want of civility and friendly feeling. The Constitution expressly extends the judicial powers to controversies between a State or citizen thereof and foreign States, citizens, or subjects without reference to the subject-matter of controversy. . . . There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it has been held that a sovereign cannot be forced into Court by suit.

"The next question is whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the *Euryale*, not as an indivldual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign State is the true and real owner of its public vessels of war. The reigning emperor, or national assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognised by our Government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such inures to his successor in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the Court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the *Euryale* has occurred in the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation."

Note.—The first part of this judgment dealing with the right of a sovereign to sue should be compared with the cases of Jurisdiction over Sovereigns; *see below*, p. 111.

THOMPSON v. POWLES.

(1828) 2 Simons 194.

The Courts cannot recognise persons declaring themselves to be the Government of a foreign country till the Executive of the State has recognised them, and they will not uphold a contract made with such persons as a Government.

Case.—The defendants, representing themselves to be the agents of the Government of the Federal Republic of Central America, which claimed to be a sovereign and independent State, publicly announced their intention of raising a loan for the said Republic on the security of bonds of the said Government, and the plaintiff, on the strength of their announcements, purchased the securities.

The plaintiff subsequently discovered that the defendants were not authorised to raise the loan, and sought to recover his money, but the defendants then put in demurrers to the claim on the ground that the State of Guatemala had never been acknowledged by Great Britain, and therefore the transaction was altogether illegal and the Court could not aid the plaintiff to recover his money.

In the course of his judgment dismissing the claim, Shadwell, V.C., said:

Judgment.—"But there is this further consideration; that this is represented to have been a contract, by the plaintiff, to purchase the obligations of persons who were stated to be the Government of the Federal Republic of Central America.

"I confess that, after all I have heard fall from the mouth of Lord Eldon, on the subject of persons representing themselves to be governments of foreign countries, which this country had not acknowledged to be governments, and which the Courts cannot acknowledge them to be till the Government of the country has recognised them to be so, it does appear to me that

this is a contract entered into by the plaintiff for the purpose of purchasing that which, by the law of the land, he could not purchase. I think that the contract, being to purchase securities from these persons, who, as the plaintiff says, were the Government of Guatemala, cannot be considered as being a contract which this Court ought to sanction. The whole case being founded on that, I do not think that I could give relief to the party who builds his case for relief entirely on a transaction originating in such a manner; and it appears to me that, on that ground, I must allow this demurrer."

Note.—This case is the converse of *Republic of Peru* v. *Dreyfus* (*see below*), and establishes that when a Government has not obtained recognition from a foreign Power, transactions with it will not be upheld by the Courts of that Power. They are treated as null. The same doctrine has been affirmed by the American Courts (*cf. Kennett* v. *Chambers*, 14 Howard 38), where it was held that a contract to raise money to help the Texans in war, they not being recognised by the United States Government, was void. There it was said:

"The validity of this contract depends upon the relation in which this country then stood to Mexico and Texas; and the duties which these relations imposed upon the Government and citizens of the United States. Texas had declared itself independent a few months previous to this agreement. But it had not been acknowledged by the United States; and the constituted authorities charged with our foreign relations regarded the treaties we had made with Mexico as still in full force, and obligatory upon both nations. Undoubtedly, when Texas had achieved her independence, no previous treaty could bind this country to regard it as a part of the Mexican territory. But it belonged to the Government, and not to individual citizens, to decide when that event had taken place. And that decision, according to the laws of nations, depended upon the question whether she had or had not a civil Government in successful operation, capable of performing the duties and fulfilling the obligations of an independent Power. It depended upon the state of the fact, and not upon the right which was in contest between the parties."

RECOGNITION OF STATES.

Oppenheim, ss. 71–75; Lawrence, 46–47; Hall, pp. 29–36; Westlake, p. 57.

REPUBLIC OF PERU v. DREYFUS BROTHERS, 1888.

L.R. 38 C.D. 348; 57 L.J.Ch. 536.

When the revolutionary or de facto Government of a country has been recognised by the Government of a foreign State, a subject of such foreign State may safely contract with that de facto Government: and if by subsequent revolution the previously existing Government of the country is restored, by international law the restored Government is bound to treat any such contract as valid.

Case.—In the year 1869 Messrs. Dreyfus and Co., who were French subjects carrying on business in Paris, entered into a contract with the then Government of Peru. Questions arose under this contract which were not settled when in 1879 Señor Nicolas di Pierola made himself Dictator of Peru and overthrew the existing Government. In 1880 he was recognised by England and France and other European States as supreme ruler of Peru, and he entered into negotiations with Messrs. Dreyfus for the purpose of raising more money for the Government of Peru. Accounts were settled and the amount due to Messrs. Dreyfus was agreed. In the following year Señor Pierola resigned, and after an interval the Government of Peru was reconstituted in the form in which it had existed previously to the dictatorship, and the Congress of the Republic passed an Act declaring void all the internal acts of government done by the Dictator, including the settlement which had been arranged between him and the defendants. In virtue of this law the Government now sought to attach moneys standing to the credit of the defendants in England in another action.

Kay, J., in refusing the application, said :

Judgment.—" It is difficult to see how this (the validity of the arrangement with Pierola's Government) can be determined by the law of Peru. It is a question of international law of the highest importance whether or not the citizens of a foreign State may safely have such dealings as existed in this case with a Government which such State has recognised. If they may not, of what value to the citizens of a foreign State is such recognition by its Government ? There have been successive Governments in European countries—usurpations of the power of previous Governments overthrown—altering the Constitution essentially. These have in turn been recognised by this and other nations. When the Government of this country recognised the third Emperor of the French, if any Englishman entered into contracts with his Government, could it be maintained that the validity of such contracts must depend upon the law of France as settled by decree of the Republic which was established on his deposition ? Obviously it would follow that no Englishman could safely contract with the present Government of France, or, indeed, with any existing Government, lest it in turn should be displaced by another Government which might treat its acts as void.

" There is no authority for any such proposition. I must take the law to be that an Englishman or Frenchman might safely contract with Señor Pierola's Government, if not before, at any rate after, it was recognised by the Governments of England and France respectively.

" The decisions on the subject are completely in accordance with the law as I have stated it. I prefer to look somewhat further than the few cases cited at the Bar ; but all the authorities to which I shall refer are within the last one hundred years. There have been in the history of the world during that period many revolutions and usurpations of supreme power among civilised nations who recognise international law. The plaintiffs' counsel have been unable to cite, nor can I find, any authority whatever in favour of their contention.

" There is a case of *Barclay* v. *Russell*, in 1797, after the

acknowledgment by this country of the independence of the United States, which was in 1782. In that state of things Lord Eldon refused to recognise the right of the United States of America to certain property in this country, consisting of bank stock which had been purchased by the Government of Maryland in the names of trustees in this country before the war with America, upon the ground that the rights of Maryland in its former condition existed under letters patent granted by the Crown of England, and had not passed to the new State of Maryland. That State had, before the Treaty of Peace, passed an Act discharging the trustees and appointing new trustees, and directing a transfer of the bank stock in this country.

"Lord Eldon said: 'They have no right as an independent State to make such an Act as that. No foreign authority of the Germanic body or France or Spain could do such an act. Nothing they could do with regard to this can be implied from the treaty. There might have been an express article in the treaty upon their claim to this subject. It might have been the subject of a specific article. Such a demand is a fit subject of treaty, to be settled as between States independent. I can find no general principle in any writer upon the law of nations, if it was proper for me to decide by reference to those laws; but I have looked for my own satisfaction; and I find no general principle carrying it farther than that the new-formed Government may invest itself with all the rights that it can command: no farther. The old Government of Maryland, a Government of a singular species, existing by letters patent, in some degree similar to a corporation, possessing rights in England, must sue in England, and ought to be regulated by the law of England, under which it has its existence. In the argument it was said the present State of Maryland has some species of right to stand in the place of the old Government, being now acknowledged to be a legitimate Government. I can admit that there is a semblance of equity in the claim upon the part of the present State of Maryland. The stock was certainly purchased at the expense of the people of Maryland.' And his

Lordship held that the specific execution of the trust having become impossible, the right to dispose of the money was vested in the Crown.

"In *Gelston* v. *Hoyt*, in the Supreme Court of the United States, the law is stated thus: 'No doctrine is better established than that it belongs exclusively to Governments to recognise new States in the revolutions which may occur in the world; and until such recognition, either by our own Government or the Government to which the new State belonged, Courts of Justice are bound to consider the ancient state of things as remaining unaltered.' "

[Finally, the Court held that the existing Peruvian Government could not recover the proceeds of the cargoes in question unless the Government of Pierola could have done so, and that they were bound by Pierola's contract.]

Note.—This case establishes that when a Government has been recognised by a foreign Power, it is entitled to bind the State in dealings with the subjects of other Powers, and it is not open to a Government which displaces it to repudiate the obligations it has incurred, at least in regard to foreign subjects. A Government can do what it likes in regard to its native subjects, because its municipal law is sovereign in its own territory, but in dealing with States or persons outside it must have regard to the principle that recognition of a Government gives that Government legal rights and renders its obligations binding.

CHAPTER IV.

STATE SUCCESSION.

Cf. Oppenheim, ss. 80–84; Lawrence, 49; Hall, pp. 99–100; Westlake, pp. 59 and 74.

WEST RAND GOLD MINING CO. v. REGEM.

L.R. 1905; 2 K.B. 391; 74 L.J. K.B. 753. (*See above*, p. 1.)

The English Courts do not recognise any principle of international law by which after annexation of conquered territory the conquering State becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered State incurred before the outbreak of war. A claim based on such a principle could not in any case be enforced against the Crown in any municipal Court.

Case.—This case, which has been cited above on the question of the legal character of international law, arose out of a petition of right brought by a Transvaal mining company. The petition alleged that before the outbreak of war between the late South African Republic and Great Britain a quantity of gold, the produce of a mine in the Republic owned by the suppliants, had been taken by officials acting on behalf of the Government of the Republic; that that Government was liable to return the gold or its value to the suppliants; and that, by reason of the conquest and annexation of the territories by the British Crown, the obligation was now binding on the King.

The Court rejected the petition, holding (1) that in the case of contracts at least international law does not recognise that

after annexation obligations of the defeated Government do not pass to the successor; (2) that the dispositions of the conqueror in the conquered country are acts of State and cannot be questioned in the municipal Court.

Lord Alverstone (L.C.J.), in his judgment, stated:

"Before dealing with the specific passages in the writings of the jurists upon which the suppliants rely, we desire to consider the proposition that by international law the conquering country is bound to fulfil the obligations of the conquered, upon principle; and upon principle we think it cannot be entertained. When making peace the conquering sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them. It is a case in which the only law is that of military force. This, indeed, was not disputed by counsel for the suppliants; but it was suggested that, although the sovereign when making peace may limit the obligations to be taken over, if he does not do so, they are all taken over, and no subsequent limitation can be put upon them. What possible reason can be assigned for such a distinction? Much inquiry may be necessary before it can be ascertained under what circumstances the liabilities were incurred, and what debts should *in foro conscientiæ* be assumed. There must also be many contractual liabilities of the conquered State of the very existence of which the superior Power can know nothing, and as to which persons having claims upon the nation about to be vanquished would, if the doctrine contended for were correct, have every temptation to concealment—others, again, which no man in his senses would think of taking over. A case was put in argument which very well might occur. A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another Power, may have been brought about by the very state of insolvency to which the conquered country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to

pay out of its own resources the debts of the insolvent State, and what difference can it make that in the instrument of annexation or cessation of hostilities matters of this kind are not provided for? We can well understand that, if by public proclamation or by convention the conquering country has promised something that is inconsistent with the repudiation of particular liabilities, good faith should prevent such repudiation. We can see no reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the Government of the conquered State. It was suggested that a distinction might be drawn between obligations incurred for the purpose of waging war with the conquering country and those incurred for general State expenditure. What municipal tribunal could determine, according to the laws of evidence to be observed by that tribunal, how particular sums had been expended, whether borrowed before or during the war? It was this and cognate difficulties which compelled Lord Robert Cecil ultimately to concede that he must contend that the obligation was absolute to take over all debts and contractual obligations incurred before war had been actually declared.

"Turning now to the text-writers, we may observe that the proposition we have put forward that the conqueror may impose what terms he thinks fit in respect of the obligations of the conquered territory, and that he alone must be the judge in such a matter, is clearly recognised by Grotius: *see* "War and Peace," Book III., chap. viii. sec. 4, and the Notes to Barbeyrac's edition of 1724, vol. ii. p. 632. For the assertion that a line is to be drawn at the moment of annexation, and that the conquering sovereign has no right at any later stage to say what obligations he will or will not assume, we venture to think that there is no authority whatever. A doctrine was at one time urged by some of the older writers that to the extent of the assets taken over by the conqueror he ought to satisfy the debts of the conquered State. It is, in our opinion, a mere expression of the ethical views of the writers; but the proposition now contended for is a vast extension even of that doctrine. It has been urged

that, in numerous cases, both of peace and of cession of territories, special provision has been made for the discharge of obligations by the country accepting the cession or getting the upper hand in war; but, as we have already pointed out, conditions the result of express mutual consent between two nations afford no support to the argument that obligations not expressly provided for are to follow the course, by no means uniform, taken by such treaties.

". . . We pass now to consider the third proposition upon which the success of the suppliants in this case must depend—namely, that the claims of the suppliants based upon the alleged principle that the conquering State is bound by the obligations of the conquered can be enforced by petition of right. It is the consideration of this part of the case which brings out in the strongest relief the difficulties which exist in the way of the suppliants. It is not denied on the suppliants' behalf that the conquering State can make whatever bargain it pleases with the vanquished; and a further concession was made that there may be classes of obligations that it could not be reasonably contended that the conquering State would by annexation take upon itself, as, for instance, obligations to repay money used for the purposes of the war. We asked more than once during the course of the argument by what rule, either of law or equity, which could be applied in municipal Courts could those Courts decide as to the obligations which ought or ought not to be discharged by the conquering State. To refer again to the instance given in the commencement of this judgment, the obligation incurred by the conquered State by which their credit has been ruined may have been contracted for insufficient consideration or under circumstances which would make it perfectly right from every point of view for the conquering State to repudiate it in whole or in part. No answer was, or could be, given. Upon this part of the case there is a series of authorities from the year 1793 down to the present time, holding that matters which fall properly to be determined by the Crown by treaty or as an act of State are not subject to the jurisdiction of the municipal Courts, and

that rights supposed to be acquired thereunder cannot be enforced by such Courts. It is quite unnecessary to refer in detail to them all. They extend from *Nabob of the Carnatic* v. *East India Co.*, 1 Ves. Jr. 371; 2 Ves. Jr. 56, down to *Cook* v. *Sprigg* (1899), A.C. 572. As a great deal of argument was addressed to us upon the latter case, we think it right to say that, although it was contended that the actual decision was not in harmony with the views of the American Courts upon analogous matters, no authority was cited, or, as far as we know, exists, which throws any doubt upon that part of the judgment which is in the following words: 'The taking possession by her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcau as an independent sovereign, which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal Courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well-understood rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.'

"We do not repeat the citations of *Secretary of State for India* v. *Kamachee*, 13 Moo. P.C. 22, and *Doss* v. *Secretary of State for India*, L.R. 19 Eq. 509, referred to in the judgment in *Cook* v. *Sprigg* (1899), A.C. 572. They form part of the chain of authorities to which we have referred, and we observe in passing that we are not to be considered as throwing any doubt upon the correctness of the decision itself in *Cook* v. *Sprigg* (1899), A.C. 572.

"It was contended by Lord Robert Cecil that the view we are taking was inconsistent with certain American decisions and with certain decisions of our own Court of Chancery, to which we

think it right to refer. A careful examination of these cases satisfies us that, rightly understood, no such inconsistency exists. The American cases were a series of decisions of the Supreme Court of the United States respecting the rights of the owners to landed property in territories formerly forming part of independent countries which had been ceded to or annexed by the United States. The particular cases cited were *United States* v. *Percheman*, 7 Peters 51; *Mitchell* v. *United States*, 9 Peters 711; *Smith* v. *United States*, 10 Peters 326; and *Strother* v. *Lucas*, 12 Peters 410. These cases arose respecting the rights of landed property in Florida, Louisiana, and Missouri. They were all cases of cession, and in all of them the treaties of cession and subsequent legislation of the United States protected the rights of owners of private property as they existed at the time of cession, and the sole question was whether, under the circumstances of each individual case, private rights of property existed and could be enforced as against the United States. No question of duty of the country, to whom the territory passed, of fulfilling the obligations of the original country in any other respect arose; and the language of Marshall, C.J., 7 Peters, at p. 86, and of Baldwin, J., 9 Peters, at p. 733; 10 Peters, at p. 329, all of which is to the same effect, must be construed solely with reference to the rights of private property in individuals, such property being locally situated in a country annexed by another country. We asked Lord Robert Cecil and Mr. Hamilton whether they had been able to find any case in which a similar principle had been applied to personal contracts or obligations of a contractual character entered into between a ceding or conquered State and private individuals. They informed us that they had not been able to do so, nor do we know of any such case. It must not be forgotten that the obligations of conquering States with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract. As is said in more cases than one, cession of territory does not

mean the confiscation of the property of individuals in that territory. If a particular piece of property has been conveyed to a private owner or has been pledged, or a lien has been created upon it, considerations arise which are different from those which have to be considered when the question is whether the contractual obligation of the conquered State towards individuals is to be undertaken by the conquering State. The English cases on which reliance was placed were *United States* v. *Prioleau*, 2 H. & M. 559, in which a claim was made by the United States Government to cotton which had been the property of the confederated States; *United States* v. *Macrae*, L.R. 8 Eq. 69, which recognised the right of the Government suppressing rebellion to all moneys, goods, and treasures which were public property at the time of the outbreak; *Republic of Peru* v. *Peruvian Guano Co.*, 36 Ch.D. 489, and *Republic of Peru* v. *Dreyfus*, 38 Ch.D. 348. The only principle, however, which can be deduced from these cases is that a Government claiming rights of property and rights under a contract cannot enforce those rights in our Courts without fulfilling the terms of the contract as a whole. They have, in our judgment, no bearing upon the propositions which we have been discussing. We are of opinion, for the reason given, that no right on the part of the suppliants is disclosed by the petition which can be enforced as against his Majesty in this or in any municipal Court; and we therefore allow the demurrer, with costs."

Note.—The doctrine laid down by the English Court in this case as to the right of the succeeding State to repudiate the obligations of its predecessor is open to question, although the decision that the actions of the Executive in the conquered country could not be reviewed in the municipal Courts is supported by abundant English authority and is unimpeachable. But that is a question purely of adjective law. The judgment of James, V.C., in *United States* v. *McRae* (8 Equity 75) (*see below*, p. 44) referred explicitly to cases of conquest as well as cession, and stated categorically that by public international law the right of succession by one State to the public property of another can only be enforced to the same extent and subject to the same obligations as if the suppressed authority had not been suppressed, and were itself seeking to enforce it. In the same way the judgment of Marshall, C.J., in the American case of *United States* v. *Percheman*

[*see below*), dealt *obiter* with conquest, and stated explicitly that the modern usage of nations would be violated if private rights were annulled by the conqueror. The Lord Chief Justice distinguished the cases in which these judgments were given, but the *dicta* contained in the judgments applied directly to the question before the Court and, it is submitted, were worthy of more consideration. It is notable also that the Italian Courts have recognised fully the duty of the successor State to take over the obligations of the predecessor, at least in regard to ceded territory.

In cases arising out of the cession of Venetia by Austria to Italy, the Court of Cassation at Florence declared in 1878: "The principles of public law provide that when it is a case of partial cession of territory the obligations contracted by the State with regard to the ceded territory pass with that territory to the State which succeeds."

UNITED STATES V. PERCHEMAN, 1833.

United States Supreme Court (7 Peters 51).

A cession of territory from one State to another does not affect the title to private property in the soil.

Case.—Percheman claimed an estate in the territory of Florida by virtue of the grant of the Spanish Governor made in 1815. Florida was ceded to the United States by Spain in 1819, and the United States Commissioners appointed to settle claims to territory rejected the claim of Percheman. The Court, however, held otherwise; and Marshall, C.J., laid down the general principles of the international law of succession as follows:

Judgment.—"It may not be unworthy of remark that it is very unusual even in cases of conquest for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest,

who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an Act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new Government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. . . .

"A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilised world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

Note.—The United States Courts have frequently confirmed this principle that the cession of a territory is not to interfere with the private rights in the ceded territory. Thus, in *United States* v. *Moreno*, 1864 (1 Wall 400), the Supreme Court, referring to the cession of California by Mexico to the United States, said:

"That cession did not impair the rights of private property. They were consecrated by the law of nations and protected by the treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations. The Act of March 3, 1851, was passed to assure to the inhabitants of the ceded territory the benefit of the rights of property thus secured to them. It recognises alike legal and equitable rights, and should be administered in a large and liberal spirit. A right of any validity before the cession was equally valid afterward."

UNITED STATES OF AMERICA v. PRIOLEAU, 1866

25 Law Journal, Chancery, N.S., 7.

Upon the suppression of a rebellion, the title to the public property of the rebel Government becomes immediately vested in the Government of the victorious State, which however must take the property subject to the liabilities attached to it by its predecessor.

Case.—Toward the end of the Civil War in the United States (1861–1865), the Confederate Government, having got possession of 1365 bales of cotton in Texas, had it shipped from Galveston to Havana, where it was consigned to an agent of Fraser and Co. On June 10, 1865, the cotton was shipped from Havana to Liverpool, consigned to the defendants, Fraser, Trenholm and Co. (Prioleau being the English member of the firm), and was of the value of £40,000. Fraser, Trenholm and Co. had made a contract with one McRae, general European agent of the Confederate Government, to build eight steamships to be employed in transporting cotton and other produce from the Confederate States. They were to receive all consignments of said merchandise and sell the same according to the instructions they should receive for that purpose. The company were to advance the expenses of transportation, and were then to recoup themselves out of the proceeds of the consignments. They had already expended £20,000 for sailing expenses, to say nothing of the cost of the ships.

When this consignment of cotton arrived in Liverpool, the Confederate Government had been dissolved, and the Confederate States had submitted to the authority of the United States Government; and the latter Government filed a bill praying to have the cotton delivered up to them, and for an injunction and receiver.

Judgment (Wood, V.C.).—"There are one or two points which,

I think, are tolerably clear in this case. The first point is with reference to the right of the United States of America, at this moment, to the cotton, subject to the agreement. I treat it first in that way. It has scarcely been disputed on the present argument, and could hardly be disputed at any further stage of the inquiry, that the right is clear and distinct, because the cotton in question is the admitted result of funds raised by a *de facto* Government, exercising authority in what were called the Confederate States of America; that is to say, several of those States which, in union, formerly constituted the United States, and which now, in fact, constitute them; and that *de facto* Government, exercising its powers over a considerable number of States (more than one would be quite enough), raises money—be it by voluntary contribution, or be it by taxation, is not of much importance. The defendant Prioleau, in cross-examination, admits that they exercised considerable power of taxation; and with those means, and claiming to exercise that authority, they obtained from several of the States of America funds by which they purchased this cotton for the use of the *de facto* Government. That being so, and that *de facto* Government being displaced, I apprehend it is quite clear that the United States of America (that is to say, the Government which has been successful in displacing the *de facto* Government, and whose authority was usurped or displaced, or whatever term you may choose to apply to it), the authority being restored, stand, in reference to this cotton, in the position of those who have acquired, on behalf of the citizens of the United States, a public property; because otherwise, as has been well said, there would be no body who could sue in respect of, or deal with, property that has been raised, not by contribution of any one sovereign State (which might raise a question, owing to the peculiar constitution of the Union, if it had been raised in Virginia or Texas, or in any given State), but the cotton is the product of levies, voluntary or otherwise, on the members of the several States which have united themselves into the Confederate State of America, and which are now under the control of the present plaintiffs, and

are represented, for all purposes, by the present plaintiffs. That being so, the right of the present plaintiffs to this cotton, subject to this agreement is, I think, clear, because the agreement is an agreement purporting to be made on behalf of the then *de facto* existing Government, and not of any other persons. That case of *The King of the Two Sicilies* and the case of *The King of Spain*, and other cases of the same kind, which it is not necessary to go through, show that whenever a Government *de facto* has obtained the possession of property as a Government, and for the purposes of the Government *de facto*, the Government which displaces it succeeds to all the rights of the former Government, and, among other things, succeeds to the property they have so acquired.

"Now I come to the second head of the question, and I confess at this moment, as at present advised, I do not feel much doubt on the subject, namely, the question whether or not, taking this property, they must or must not take it subject to the agreement. It appears to me, at present, they must take it subject to the agreement. It is an agreement entered into by a *de facto* Government, treating with persons who have a perfect right to deal with them. I apprehend if they had been American subjects they might do so. One of them, Prioleau, is not an American subject, he is a naturalised British subject; he would have a perfect right to deal with a *de facto* Government; and it cannot be compared with any one of those cases Mr. Gifford put, of persons taking the property of another with knowledge of the rights of that other. That is a species of argument that cannot be applied to international cases of this description, and for a very good reason; if so, there would be no possibility during the existence of a Government *de facto* of any person dealing with that Government in any part of the world. The Courts of every country recognise a Government *de facto* to this extent, for the purpose of saying—you are established *de facto*, if you are carrying on the course of government, if you are allowed by those whom you affect to govern to levy taxes on them, and they pay those taxes, and contribution is made accordingly, or you are acquiring property, and are at war, having the rights of belli-

gerents, not being treated as mere rebels by persons who say they are the authorised Government of the country. Other nations can have nothing to do with that matter. They say we are bound to protect our subjects who treat with the existing Government; and we must give to those subjects, in our country, every right which the Government *de facto* can give to them, and must not allow the succeeding Government to assert any right as against the contracts which have been entered into by the Government *de facto*; but, as expressed by Lord Cranworth in the case referred to, they must succeed in every respect to the property as they find it, and subject to all the conditions and liabilities to which it is subject and by which they are bound. . . . If the case had been this (and it is the only case I can consider as making any difference, but that difference would be fatal to the plaintiffs' case in another point of view): if they had been a set of marauders, a set of robbers (as was said to be the case in the kingdom of Naples, truly or untruly), devastating the country, and acquiring property in that way, and then affecting to deal with your subjects in England, it would not be the United States, but the individuals who had been robbed and suffered, who could come as plaintiffs. The United States could only come to claim this because it has been raised by public contribution; and although the United States, who are now the Government *de facto* and *de jure*, claim it as public property, yet it would not be public property unless it was raised, as I have said, by exercising the rights of government, and not by means of mere robbery and violence.

"I confess, therefore, I have so little doubt, that this agreement is one that would be binding on the plaintiffs, that I cannot act against these gentlemen without securing to them the reasonable benefit of this agreement; and I cannot put them under any terms which would exclude them from the reasonable benefit of what they are entitled to, and must be held entitled to, as I think, at the hearing of the cause."

Note.—This decision of the English Court shows that in dealing with a claim of a successor State to property of a conquered Government in

England the equitable rule will be applied that the benefit of a contract can only be taken with the burden. The judgment in *West Rand Mining Co.* v. *Regem* (*see above*) is not entirely consistent with this view.

In the case of the *United States of America* v. *McRae*, 1869, L.R. 8 Equity 69, James, V.C., likewise held "that, upon the suppression of a rebellion, the restored legitimate Government is entitled, as of right, to all moneys, goods, and treasure which were public property of the Government at the time of the outbreak, such right being in no way affected by the wrongful seizure of the property by the usurping Government.

"But with respect to property which has been voluntarily contributed to, or acquired by, the insurrectionary Government in the exercise of its usurped authority, and has been impressed in its hands with the character of public property, the legitimate Government is not, on its restoration, entitled by title paramount, but as successor only (and to that extent recognising the authority) of the displaced usurping Government; and in seeking to recover such property from an agent of the displaced Government can only do so to the same extent, and subject to the same rights and obligations, as if that Government had not been displaced and was itself proceeding against the agent."

THE RIGHTS OF A CONQUERING STATE.

Cf. Oppenheim, ss. 236–240; Lawrence, s. 77.

CAMPBELL V. HALL, 1744.

Cowper's Reports, p. 204.

The Powers of the English Crown in cases of conquest considered.

Case.—The action was brought by Campbell, who was a natural born subject of the United Kingdom, and who in 1763 purchased an estate in the island of Grenada, against the defendant, Hall, who was a collector of a duty upon all goods exported from the island, to recover a payment of duty which it was alleged had not been imposed by lawful or sufficient authority. The island of Grenada was taken by the British from the French in war, and in the articles of capitulation it was agreed that it should continue to be governed by its present laws till the King's pleasure was

known, and that the inhabitants should pay no other duties than what they had before paid to the French King. In October 1763 a proclamation was issued announcing that by letters patent the Governor of the island was empowered to make, constitute, and ordain laws; and in March 1764 the letters patent were issued to the Governor, who summoned an assembly. In July 1764 the King, however, by letters patent, imposed the duty of 4½ per cent. on all goods exported from the island. It was urged that these letters patent were void because (1) the King could not exercise legislative power over a conquered country; (2) he could not do so anyhow after the proclamation of October 1763.

Lord Mansfield, in giving judgment for the plaintiff on the ground that the King by the proclamation of October 1763 had taken it out of his power to legislate directly for the island, laid down the following general propositions on the effect of conquests.

Judgment.—A country conquered by the British Army becomes a dominion of the King in the right of the Crown, and therefore necessarily subject to the legislature, the Parliament of Great Britain.

(2) The conquered inhabitants, once received under the King's protection, become subjects and are to be universally considered in that light, not as enemies or aliens.

(3) The articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true interest and meaning.

(4) The law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there puts himself under the law of the place.

(5) The laws of a conquered country continue in force until they are altered by the conqueror.

(6) The King (and when I say the King I always mean the King without the concurrence of Parliament) has a power to

alter the old and to introduce new laws in a conquered country, this legislature being subordinate (*i.e.* subordinate to his own authority in Parliament). He cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion—as, for instance, from the laws of trade or from the powers of Parliament—or give him privileges exclusive of his other subjects.

CHAPTER V.

ACQUISITION OF TERRITORY.

Cf. Oppenheim, ss. 291–298; Westlake, p. 100; Hall, p. 101.

JOHNSON v. McINTOSH, 1828.

Supreme Court of the United States (8 Wheaton, 533).

Discovery gives a valid title to territory occupied by uncivilised peoples.

The right of the North American Indians to the lands which they possessed was that of occupancy merely.

Judgment (Marshall, C.J.).—"The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773 and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Praukeshaw nations; and the question is, whether this title can be recognised in the Courts of the United States.

"The facts, as stated in the case argued, show the authority of the chiefs who executed this conveyance so far as it could be given by their own people; and likewise show that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.

"As the rights of society to prescribe those rules by which property may be acquired and preserved is not, and cannot be, drawn into question; as the title to lands, especially, is and

must be admitted to depend entirely upon the law of the nation in which they lie, it will be necessary, in pursuing this inquiry, to examine, not singly, those principles of abstract justice which the Creator of all things has impressed on the mind of His creature man, and which are admitted to regulate, in a great degree, the rights of civilised nations, whose perfect independence is acknowledged; but those principles also which our own Government has adopted in the particular case, and given us as the rule for our decision.

"On the discovery of this immense continent the nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the New by bestowing on them civilisation and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the rights of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the Government by whose subjects, or by whose authority, it was made,, against all other European Governments, which title might be consummated by possession.

"The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented. Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no

other Power could interpose between them. On the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded, but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion, but their rights to complete sovereignty, as independent nations, were necessarily diminished and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

"Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title. France, also, founded her title to the vast territories she claimed in America on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. . . . No one of the Powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots to discover countries then unknown to *Christian people*, and to take possession of them in the name

of the King of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title. In this first effort made by the English Government to acquire territory on the continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission is confined to countries 'then unknown to all Christian people'; and of these countries Cabot was empowered to take possession in the name of the King of England, thus asserting a right to take possession notwithstanding the occupancy of the natives, who were heathen, and, at the same time, admitting any prior title of any Christian people who may have made a previous discovery. . . .

"Thus, all nations of Europe who have acquired territory on this continent, have asserted in themselves and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. . . .

"The power now possessed by the Government of the United States to grant lands, resided, while we were colonies, in the Crown, or its grantees.

"The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and contest it. An absolute title to lands cannot exist at the same time in different persons and in different Governments."

Note.—In a recent case determined by the English Privy Council it was held that the elected chiefs of a tribe of Indians residing within the limits of a *seigniory* given in the seventeenth century by a French king to a monastery had no independent title to administer or control the territory (*Corinthe* v. *Ecclesiastics of St. Sulpice*, 1912).

THE "FAMA," 1804.

5 C. Rob. p. 106.

To consummate a transfer of territory there must be some act of possession or occupancy.

Case.—The case arose on a claim in the Admiralty Court of a merchant resident at New Orleans, in Louisiana, for property taken by a British vessel in 1803 on a voyage from New Orleans to Havre. The question turned actually on the national character of Louisiana, whether at the time of the capture it was to be considered as a Spanish settlement or as belonging to France by reason of the Treaty of Idelfonso, 1796, by which it was ceded to that country.

Judgment (Sir W. Scott).—"The present question is a general one, respecting the situation in which the people of a distant settlement are placed by a treaty of the State to which they undoubtedly belong and by which they are stipulated to be transferred to another Power. . . . The question has been fully argued as to the principle of law whether the treaty did not in itself confer full sovereignty and right of dominion, and whether the inhabitants were not so ceded by the treaty as to become immediately French subjects. . . . It is to be observed then that all corporeal property depends very much on occupancy, and with respect to the origin of property this is the sole foundation. *Quod nullius est ratione naturali occupanti conceditur.* So with regard to transfer also, it is universally held in all systems of jurisprudence that to consummate the right of property, a person must unite the right of the thing with possession. A question has been raised indeed by some writers whether this necessity proceeds from what they call the natural law of nations or from what is only conventional. Grotius seems to consider it as proceeding only from civil institutions. Puffendorf and Pothier go further. All concur, however, in holding it to be a necessary principle of jurisprudence that to complete the right of property,

the right of the thing and the possession of the thing itself should be united; or, according to a technical expression, that there should be both the *jus in rem* and the *jus in re*. This is the general law of property and applies, I conceive, not less to the right of territory than to other rights. Even in newly discovered countries, where a title is meant to be established for the first time some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, where the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion and under what law they are to live. This I conceive to be the general propriety of principle on the subject, and no less applicable to cases of territory than to property of every other description."

After dealing with the practice which confirmed the principle the judgment concluded: "In this situation of things it appears to me that the colony must be considered as continuing at the time of capture under the dominion of Spain, and consequently that these persons, as Spanish subjects, are entitled to restitution."

CHAPTER VI.

TERRITORIAL WATERS.

Cf. Oppenheim, ss. 185–190; Lawrence, 85–87; Hall, pp. 151 ff.; Westlake, pp. 118, 184 ff.

THE "ANNA," 1805.

5 C. Robinson, 373.

The capture of the ship of an enemy in the territorial waters of a neutral is illegal; and the ship will be restored by the Prize Court of the captor.

Territorial waters extend three miles from the shore, or from islands near shore.

Case.—This was the case of a ship under American colours, with a cargo of logwood and about thirteen thousand dollars on board, bound from the Spanish Main to New Orleans, and captured by the *Minerva* privateer near the mouth of the River Mississippi. A claim was entered under the direction of the American Minister for the ship and cargo, as taken within the territory of the United States, at the distance of a mile and a half from the western shore of the principal entrance of the Mississippi, and within view of a port protected by a gun, and where is stationed an officer of the United States.

Judgment (Sir W. Scott).—"When the ship was brought into this country a claim was given of a grave nature, alleging a violation of the territory of the United States of America. This great leading fact has very properly been made a matter of much discussion, and charts have been laid before the Court to show the

place of capture, though with different representations from the adverse parties. The capture was made, it seems, at the mouth of the River Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is *terræ dominium finitur, ubi finitur armorum vis*, and since the introduction of fire-arms that distance has usually been recognised to be about three miles from the shore. But it so happens in this case that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the mainland. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of 'no man's land,' not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds' nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which, indeed, they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law. *Quod vis fluminis de tuo prædio detraxerit, et vicino prædio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory.

"I fthey do not belong to the United States of America, any other Power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any

arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

"I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. But it is said that the act of capture is to be carried back to the commencement of the pursuit, and that if a contest begins before, it is lawful for a belligerent cruiser to follow, and to seize his prizes within the territory of a neutral State. And the authority of Bynkershoek is cited on this point. True it is that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been adopted by any other writers. I confess I should have been inclined to have gone along with him, to this extent, that if a cruiser, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had summoned a vessel to submit to examination and search, and that vessel had fled to such places as these, entirely uninhabited, and that the cruiser had, without injury or annoyance to any person whatever, quietly taken possession of his prey, it would be stretching the point too hardly against the captor to say that on this account only it should be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere following to such a place as this is would, I think, not invalidate a seizure otherwise just and lawful.

"But that brings me to a part of the case on which I am of opinion that the privateer has laid herself open to great reprehension. Captors must understand that they are not to station themselves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river, much less in the river itself. It appears from the privateer's own log-book that this vessel has done both; and as to any attempt to shelter this

conduct under the example of King's ships, which I do not believe, and which, if true, would be no justification to others, captors must, I say, be admonished, that the practice is altogether indefensible, and that if King's ships should be guilty of such misconduct, they would be as much subject to censure as other cruisers."

Note.—This case deals particularly with the question of capture by a belligerent within the territorial waters of a neutral (for which *see below, p.* 159); but the decision contains dicta of general application on the broad question of what are territorial waters.

JURISDICTION IN TERRITORIAL WATERS.

Territorial Waters Jurisdiction Act, 1878.

41 & 42 Vict. chap. lxxiii.

An Act to regulate the Law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions.

The Statute enacts:—

Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same as follows:

1. This Act may be cited as the Territorial Waters Jurisdiction Act, 1878.

2. An offence committed by a person, whether he is or is not

a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

3. Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any Court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

4. On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor as is required by this Act as being given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's Principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of Her Majesty's dominions and containing such consent and certificate shall be sufficient evidence for all the purposes of this Act of the consent and certificate required by this Act.

Proceedings before a justice of the peace or other magistrate previous to the committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial shall not be deemed proceedings for the trial

of the offence committed by such offender for the purpose of the said consent and certificate under this Act.

5. Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

6. This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

7. In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereinafter assigned to them; that is to say,

"The jurisdiction of the Admiral," as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any other part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate, or officer:

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands:

"The territorial waters of Her Majesty's dominions," in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part

of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions:

"Governor," as respects India, means the Governor-General or the Governor of any presidency; and where a British possession consists of several constituent colonies, means the Governor-General of the whole possession or the Governor of any of the constituent colonies; and as respects any other British possession, means the officer for the time being administering the government of such possession; also any person acting for or in the capacity of Governor shall be included under the term "Governor."

"Offence" as used in this Act means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force:

"Ship" includes every description of ship, boat, or other floating craft.

"Foreign ship" means any ship which is not a British ship.

Note.—This Act was passed in consequence of the decision in *The Queen* v. *Keyn* (*see above, p.* 6), where it was held by a majority of the judges of the Court of Crown Cases Reserved that the English Court had no jurisdiction at common law over offences committed by foreigners in territorial waters. It treats territorial waters as subject to the sovereignty of the littoral State, but places no maximum limit to their extent.

Territorial Gulfs and Bays.

Cf. Oppenheim, s. 191; Hall, p. 155; Westlake, p. 187.

THE DIRECT UNITED STATES CABLE CO. v. THE ANGLO-AMERICAN TELEGRAPH CO.

Privy Council, 1877.

Law Reports, 2 App. Cases, 394.

Conception Bay, in Newfoundland, which is something over fifteen miles wide, and forty to fifty miles long, is a British bay, and a part of the territorial waters of Newfoundland.

Case.—This suit was one in which the respondent company had obtained an injunction against the appellant company restraining them from laying a telegraph cable in Conception Bay, Newfoundland, and thereby infringing rights granted by the legislature of that island to the respondent company. The appellant company contended that Conception Bay (which is rather more than twenty miles wide at its mouth and runs inland between forty and fifty miles) was not British territorial waters, but a part of the high seas. The buoy and cables complained of were laid within the bay at a distance of more than three miles from the shore.

Judgment.—The judgment was delivered by Lord Blackburn, who, after reviewing the cases under the Common Law of England continued: "Passing from the common law of England to the general law of nations, as indicated by the text-writers on international jurisprudence, we find an universal agreement that harbours, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'a bay' for this purpose.

"It seems generally agreed that where the configuration and

dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory, and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting, therefore, a width of one cannot-shot from shore to shore, or three miles; some a cannon-shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the British Channel which in *Reg.* v. *Cunningham* was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable. It does not appear to their Lordships that jurists and text-writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it was necessary in this case to lay down a rule the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive), the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

Jurisdiction over Bays.

THE NORTH ATLANTIC COAST FISHERIES ARBITRATION, 1910

Case.—The question of the extent of the jurisdiction over bays was raised in the "North Atlantic Coast Fisheries Arbitration," in which the award was given by the Hague Tribunal on September 7, 1910. The arbitration dealt with the dispute between Great Britain and the United States about the fisheries off Newfoundland, as to which certain privileges were accorded to the subjects of the United States by the treaty of 1818. The dispute had been a constant source of friction for the better part of a century, and one of the chief questions at issue was as to the meaning of a renunciation clause in the treaty by which the inhabitants of the United States gave up any former right enjoyed or claimed of taking, drying, or curing fish "in or within three marine miles of any of the coast bays, creeks, or harbours of Her Britannic Majesty's dominions in North America" not included in certain limits.

The question which was submitted to the arbitrators on this head was thus formulated: "From where must be measured the three marine miles of any of the coasts, bays, creeks, or harbours referred to in the said article?"

On the point of construction Great Britain contended that the bays, which were referred to in the treaty without qualification, were geographical bays, and that it was immaterial whether, apart from the treaty, they were territorial or not (*i.e.* under the sovereignty of Great Britain), though she maintained that they were in fact territorial. The United States, on the other hand, contended that the bays referred to were those under the sovereignty of Britain, by which was meant those that were six miles or less in width *inter fauces terræ*, because the three-mile rule as shown by the treaty was a principle of international law applicable to coasts, and should be strictly and systematically applied to bays.

The majority of the arbitrators favoured the general contentions of Britain.

"Now considering," they say, "that the treaty used the general term 'bays' without qualification, the Tribunal is of opinion that these words of the treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing, unless the United States can adduce satisfactory proof that any restrictions or qualifications of the general use of the term were or should have been present to their minds."

To discharge this onus of proof the United States advanced six principal arguments, based either on the nature and other terms of the treaty or on the application of the three-mile rule to bays. In the latter connection they maintained in effect that the limit was a rule of international law applicable to coasts and should be applied strictly and systematically to bays, that no exception should be allowed except where sanctioned by convention or established usage, a condition not satisfied in the great majority of the bays in question, which exceeded six miles *inter fauces terræ*.

A majority of the arbitrators (Dr. Drago dissenting) rejected each and all of these contentions. The application of the three-mile limit to bays was rejected for seven reasons, two of which relate to international law.

"(*a*) Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry, are all vitally concerned with the control of bays penetrating the national coast-line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but as no principle of international law recognises any specified relation between the concavity of the bay and the requirements for

control of the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule; nor can this Tribunal take cognisance in this connection of other principles concerning the territorial sovereignty over bays such as ten-mile or twelve-mile limits of exclusion based on international acts subsequent to the treaty of 1818, and relating to coasts of a different configuration and conditions of a different character.

"(*b*) Because the opinion of jurists and publicists quoted in the proceedings conduce to the opinion that, speaking generally, the three-mile limit should not be strictly and systematically applied to bays."

As to the connotation of the term bays, the Tribunal made the following declaration:

"The negotiators of the treaty of 1818 did not probably trouble themselves with subtle theories concerning the notion of 'bays'; they most probably thought that every one knew what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated: the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented, the special value which it has for the industry of the inhabitants of its shores, the distance which it is secluded from the highway of nations in the open sea, and other circumstances not possible to enumerate in general."

"For these reasons the Tribunal decides and awards:

"In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast."

"But considering the Tribunal cannot overlook that this answer

to Question V., although correct in principle and the only one possible in view of the want of a sufficient basis for a more concrete answer, is not entirely satisfactory as to its practical applicability, and that it leaves room for doubts and differences in practice. Therefore the Tribunal considers it its duty to render the decision more practicable and to remove the danger of future differences by adjoining to it a recommendation in virtue of the responsibilities imposed by Article IV. of the Special Agreement.

"Considering, moreover, that in treaties with France, with the North German Confederation and the German Empire, and likewise in the North Sea Convention, Great Britain has adopted for similar cases the rule that only bays of ten miles width should be considered as those wherein the fishing is reserved to nationals. And that in the course of the negotiations between Great Britain and the United States a similar rule has been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts. And that, though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two Powers.

"Now therefore this Tribunal in pursuance of the provisions of Article IV. hereby recommends for the consideration and acceptance of the High Contracting Parties the following rules and method of procedure for determining the limits of the bays hereinbefore enumerated.

"(1) In every bay, not hereinafter specifically provided for, the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles."

(Other rules follow which are not material.)

The recommendations of the Tribunal, which were in the nature of a compromise, adopted in part the theory that bays are determined by lines drawn between headlands, and in part the conventional extension of the three-mile limit which had been

sanctioned for certain European bays by international convention.

Note.—In the Behring Sea Arbitration between Great Britain and the United States, which was concluded in 1893, similar questions arose as to the right of a State to exercise jurisdiction on the high seas beyond the three-mile limit for the purpose of protecting fur seals. The United States cutter had arrested certain Canadian vessels in the Behring Sea at distances varying from fifteen to one hundred miles from land for taking seals; but the tribunal found that "the United States have no right to the protection of or property in the seals frequenting the islands of the United States in Behring Sea when the same are found outside the ordinary three-mile limit." Accordingly the concurrence of Great Britain was held to be necessary to the establishment of regulations for the proper protection and preservation of fur seals resorting to Behring Sea.

CHAPTER VII.

LIMITS OF JURISDICTION.

Cf. Oppenheim, ss. 143–147; Lawrence, 93–101; Westlake, p. 238 ff.; Hall, p. 909 ff.

MACLEOD v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

L.R. 1891; Appeal Cases, p. 456; 60 L.J. P.C. 55.

A State has, apart from conventional rights, jurisdiction only over its own subjects and persons within its territories.

Case.—The appellant was, on July 13, 1872, at Darling Point, in the Colony of New South Wales, married to one Mary Manson, and in her lifetime, on May 8, 1889, he was married, at St. Louis, in the State of Missouri, in the United States of America, to Mary Elizabeth Cameron. He was afterwards indicted, tried, and convicted, in the Colony of New South Wales, for the offence of bigamy, under sec. 54 of the Criminal Law Amendment Act of 1883 (46 Vict. No. 17).

Lord Halsbury (L.C.), in giving the judgment of the Privy Council, to whom an appeal against the conviction was brought, said:

Judgment.—"Upon the face of this record the offence is charged to have been committed in Missouri, in the United States of America, and it therefore appears to their Lordships that it is manifestly shown, beyond all possibility of doubt, that the

offence charged was an offence which, if committed at all, was committed in another country, beyond the jurisdiction of the Colony of New South Wales.

"The result, as it appears to their Lordships, must be that there was no jurisdiction to try the alleged offender for this offence, and that this conviction should be set aside. Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the Bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, 'Extra territorium jus dicenti impune non paretur,' would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys* v. *Boosey*, expresses the same proposition in very terse language. He says: 'The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons must, *prima facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect.' All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than her Majesty's subjects; more than any persons who may be within the jurisdiction of the colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass."

GURDYAL SINGH v. RAJAH OF FARIDKOTE.

L.R. 1894; Appeal Cases, 670.

All jurisdiction is primarily territorial: and except in special cases a State has no jurisdiction over a foreigner who is not within the territory and who owes no allegiance to the State.

Case.—The appellant in the Faridkote case had formerly been in the Rajah's service, but had ceased to reside in the State, being at the time the action was brought in Jhind. He was there served with processes of the Faridkote Court, which he disregarded; and he never appeared or otherwise submitted himself to the jurisdiction. Decrees were made against him and it was attempted to enforce them in the Punjab Courts. The Judicial Committee of the Privy Council on appeal rejected the competence of the jurisdiction of the Faridkote Court.

In the course of the judgment, which was delivered by Lord Selborne, it was said:

Judgment.—"The appellant disregarded the processes and never appeared to either of the suits. He was under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise, unless that Court had lawful jurisdiction over him. Under these circumstances there was . . . nothing to take this case out of the general rule that the plaintiff must sue in the Court to which the defendant is subject at the time of suit (*Actor sequitur forum rei*), which is rightly stated by Sir R. Phillimore to 'lie at the root of all international, and of most domestic, jurisprudence on this matter.' All jurisdiction is properly territorial, and *extra territorium jus dicenti, impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory; it

may be exercised over movables within the territory; and in questions of status or succession governed by domicil it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (*e.g.* under the Roman Empire), the legislature of the sovereign may distribute and regulate jurisdiction, but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the power which so legislates. In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorised by special local legislation) in the country of the forum by which it was pronounced. These are the doctrines laid down by all the leading authorities on international law . . . and no exception is made to them, in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the *locus solutionis*. In those cases, as well as others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice."

Lord Selborne went on to point out certain exceptions to the general rule of jurisdiction as where the action relates to land within the territory.

Note.—These two cases illustrate negatively the rule that a State has jurisdiction over all persons and things within its territory but not, with some exceptions, over persons and things outside it. The limits of jurisdiction are not, however, very clearly defined. The cases that follow show that the State has jurisdiction over its ships on the high seas, which by a fiction are regarded as a part of its territory for the purpose; and, further, it may have jurisdiction over its subjects abroad in respect of certain criminal offences committed by them. Thus in *Earl Russell's Case* [L.R. 1901, A.C. 446) an English peer was sentenced by a house of his

peers for bigamy committed in America, it being held that the English Matrimonial statute, unlike the New South Wales statute, which was considered in *Macleod* v. *Attorney-General of New South Wales*, conferred an extra-territorial jurisdiction. And in *Cookney* v. *Anderson* (1 D. J. & S. 365) Lord Westbury stated a large ground on which the legislature of any country is warranted in conferring on its civil tribunals an extra-territorial jurisdiction, viz., "the right which it receives by international law of summoning all persons interested wherever resident, when the subject or suit arises or is situate within its own territory, and falls to be determined by its own law and the judgments of its own Courts of Civil Jurisdiction." This statement was held to be too sweeping in *Drummond* v. *Drummond* (L.R. 2 Ch. 32), but the right of the legislature in a British colony to make rules for service of a writ on an absent defendant in respect of a contract to be performed in the colony has been expressly upheld in the case of *Ashbury* v. *Ellis* (L.R. 1893, A.C. 339). The decision in the Faridkote case is therefore limited by the rule that a State may claim to exercise jurisdiction over persons not within its territory and not its subjects, but it may not be able to enforce judgments against such persons through a foreign tribunal.

EXCEPTIONS TO ORDINARY RULES ABOUT JURISDICTION: I. CHRISTIAN SUBJECTS RESIDENT IN EASTERN COUNTRIES.

Cf. Oppenheim, ss. 318 and 440; Lawrence, 109.

PAPAYANNI v. THE RUSSIAN STEAM NAVIGATION COMPANY, 1868.

2 Moore P.C., N.S. 161.

As between Oriental and Christian States a cession of jurisdiction may be expressed by usage and acquiescence. There is no compulsory power in an English Court in Turkey over any but British subjects: but a Russian may voluntarily submit to the jurisdiction of such a Court.

Case.—This was an appeal from a judgment pronounced by the British Consular Court at Constantinople respecting damage by collision off the island of Marmora, whereby the steamer *Colchide* was lost. The appellants were British subjects and owners

of the s.s. *Laconia*; the respondents were Russian subjects and were the owners of the s.s. *Colchide*. The principal question was as to the jurisdiction of the Consular Court; and on this point Dr. Lushington, in giving the judgment of the Privy Council, said:

Judgment.—"In considering what power and what jurisdiction was conceded to Great Britain within certain portions of the Turkish dominions, it must always be borne in mind that in almost all transactions, whether political or mercantile, a wide difference subsists in the dealings between an Oriental and a Christian country and the intercourse between two Christian nations. It is true, beyond all doubt, that as a matter of right no State can claim jurisdiction of any kind within the territorial limits of another independent State. It is also true that between two Christian States all claims for jurisdiction of any kind or exemption from jurisdiction must be founded on treaty or engagements of similar validity. Such, indeed, were Factory establishments for the benefit of trade.

"But though, according to the laws and usages of European nations, a cession of jurisdiction to the subjects of one State within the territory of another would require, generally at least, the sanction of a treaty, it may by no means follow that the same strict forms, the same precision of treaty obligations, would be required or found in intercourse with the Ottoman Porte. . . . Consent may be expressed in various ways—by constant usage permitted and acquiesced in by the authorities of the State, active assent, or silent acquiescence when there must be full knowledge. We entertain no doubt that, so far as relates to the Ottoman Government, no objection is tenable against the exercise of jurisdiction between British and Russian subjects. Indeed the objection, if any such could be urged, should come from the Ottoman Government rather than a British suitor, who in this case is bound by the law established in his own country. We think that, so far as the Ottoman Government was concerned, it is sufficiently shown that they have acquiesced in allowing to the British Government a jurisdiction, whatever be

its peculiar kind, between British subjects and the subjects of other Christian States.

"It appears to us that the course was this: that at first, from the total difference of religious habits and feelings, it was necessary to withdraw as far as practicable British subjects from the native Courts; thus in the progress of time commerce increasing and various nations having the same interest in abstaining from resort to the tribunals of Musulmans, recourse was had to Consular Courts, and by degrees the system became general. Of all this the Government of the Ottoman Porte must have been cognisant, and their long acquiescence proves consent. The principles are fully explained in the celebrated judgment of Lord Stowell in the case of *The Indian Chief* (*see below*, p. 175).

"Though the Ottoman Porte could give and has given to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws, it neither has professed to give nor could give to any one Power any jurisdiction over the subjects of another Power. But it has left those Powers at liberty to deal with each other as they may think fit; and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own Sovereign and that of the Sovereign to whose tribunals they resort.

"There is no compulsory power in an English Court in Turkey over any but British subjects, but a Russian or other foreigner may, if he pleases, voluntarily resort to it with the consent of his Sovereign and thereby submit himself to the jurisdiction."

Note.—This case shows the origin of that extra-territorial jurisdiction enjoyed by European Courts in Eastern countries, and the limitation of their powers. The consular Courts derived their existence in Turkey from the Capitulations which the Sublime Porte entered into with several European Powers in the eighteenth century. Similar Courts have been established in other Eastern countries (*e.g.* Persia, Siam, and China) under treaties; and the powers of the Crown to establish such jurisdictions have been laid down in the Foreign Jurisdiction Act, 1890, which consolidates and supersedes a number of earlier Acts. The jurisdiction is limited by the terms of the treaty under which it is granted, and it was held in *The*

Imperial Japanese Government v. *P. & O. Co* (1896, A.C. 644) that it would be an excess of the jurisdiction granted to the British Consular Courts if it were to entertain by way of counterclaim a claim by a British defendant against a Japanese plaintiff, the treaty giving the territorial Courts of Japan exclusive competence over claims against Japanese subjects. In Egypt Mixed Courts have been established, where cases between foreigners of different nationalities and between foreigners and native subjects are tried before a Bench consisting of judges of different European countries and a native element.

II. Jurisdiction on the High Seas.

Cf. Oppenheim, ss. 146 and 240–244; Lawrence, 100; Hall, p. 244 ff.; Westlake, p. 175–180.

MARSHALL v. MURGATROYD, 1870.

L.R. 6 Q.B. 31; 40 L.J. M.C. 7.

According to the rule that a ship on the high seas is deemed part of the territory of the State to which she belongs, a bastard child of which a woman has been delivered on board an English ship is to be deemed born in England.

Case.—The respondent was delivered of a bastard child on board the ship *Palmyra*, whilst sailing from New York to Liverpool; that ship belonged to the Cunard line of steamers, and it was admitted by the appellant's attorney that the Cunard Line was an English line. The magistrates made an order against the appellant for the maintenance of the child. It was contended on the part of the appellant that the ship, when respondent was delivered, was on the high seas, and at least six hundred miles from Liverpool, and that being so, he further contended that the magistrates could not, under the bastardy laws, make an order upon the appellant, inasmuch as the child was born "out of England."

Judgment (Blackburn, J.).—"Our judgment must be for the respondent. It has been argued that the provisions of 7 & 8 Vict. c. 101, under which this order is made, extend only to England

and Wales; that the child of which the respondent was delivered, having been born on the high seas, was born out of England, and that therefore the order is invalid. I think that the evidence set out in the case is sufficient to show that the Cunard steamer is an English ship. It is part of the common law and of the law of nations that a ship on the high seas is a part of the territory of that State to which she belongs; and therefore an English ship is deemed to be part of England. The child having been born on board an English ship, the statute applies. The justices were therefore right in making the order."

Note.—The rule that a State has civil as well as criminal jurisdiction over its subjects on its ships for actions which take place while they are on the high seas is so elementary that it has not been seriously discussed in any reported case of modern times; but this decision shows how the rule is applied in a particular case. The English bastardy Statutes were held to extend to a birth which took place on an English ship on the high seas. It was necessary to establish that the ship was English because the English jurisdiction normally applies only to her own vessels. Collision, however, is held to be a matter *communis juris*, and can therefore be adjudicated on by the Courts of any State (*The Johann Friederich*, 1 Wm. Robinson, 35, and *The Belgenland*, 114 U.S. 355), where the Supreme Court of the United States held it had jurisdiction in a claim made in an American Court by the captain of a Norwegian barge against a Belgian steamer which in mid-ocean had run down and sunk his vessel.

REGINA v. KEYN (THE FRANCONIA).

L.R. 2, Exchequer Division, p. 63; 46 L.J. M.C. 17.

(*See above*, p. 6.)

The position of a foreign private ship on the high seas considered.

Case.—The facts of this case have already been set out (*see above*, p. 6). The following passage from the judgment of Lindley, J., is notable here, because it deals with the question of the jurisdiction over foreign merchantmen.

Judgment.—"It is, however, argued that a foreign ship in its

passage over the high seas is subject, and subject only, to the law of the country to which the ship belongs; that such a ship is part of the territory of that country, and that the laws of no other country apply to it; and it is further contended that this proposition is true, not only with respect to the conduct of those on board, *inter se*, but also with respect to their conduct towards other persons.

"This contention renders it necessary to investigate the doctrine that a merchant ship is part of the territory of the country whose flag she bears. It is obvious that she is not so in point of fact; and it is easy to show that the doctrine holds good to a very limited extent indeed. First, it is admitted that a foreign merchant ship which enters the ports, harbours, or rivers of England becomes subject to English law; her so-called territoriality does not in that case exclude the operation of English law: *Cunningham's Case* (Bell's Crown Cases, 72). Secondly, it is conceded that, even in time of peace, the territoriality of a foreign merchant ship, within three miles of the coast of any State, does not exempt that ship or its crew from the operation of those laws of that State which relate to its revenue or fisheries. . . .

"When, indeed, a ship is out at sea in waters which are not the territorial waters of any State, it is right that those on board her should be subject to the laws of the country whose flags she bears, for otherwise they would be subject to no law at all. To this extent a ship may be said to be part of the territory of the country of her flag (*see* Manning's Law of Nations, pp. 117–255); but so to speak of her is to employ a metaphor, and this must never be lost sight of.

"Again, for some purposes at all events, a ship may remain subject to the laws of her own State even when in the territorial waters of another State. In *Reg.* v. *Anderson* (Law Rep., 1 Crown Cases, 161) a foreigner was tried and convicted in England for a manslaughter committed by him when on board a British ship in the Garonne. It was held that, though he might have been properly tried and convicted in France, the jurisdiction of the

English Courts over him was not thereby ousted. The so-called territoriality of a ship may give jurisdiction to the State whose flag she bears, without exempting her from the jurisdiction of the State whose waters she enters.

Note.—These remarks complement what was said in *Regina* v. *Lesley* (*below*), and show that a foreign merchant-vessel may be liable to English jurisdiction for a tort committed in our territorial waters. In *Regina* v. *Anderson* (1 C.C.R.) it was said per Byles, J.: "A British ship is for the purposes of this question like a floating island; and when a crime is committed on board a British ship, it is within the jurisdiction of the Admiralty Court, and the offender is as amenable to British law as if he had stood in the Isle of Wight and committed the crime. . . . The only effect of the ship being within the ambit of French territory is that there might have been concurrent jurisdiction had the French claimed it. When a merchant-vessel is in a foreign port, matters of discipline and things done on board which only affect the vessel are left by the local authorities to be dealt with by the authorities of the nation to which the vessel belongs; but if crimes are committed on board which may disturb the peace of the ports the local Court has jurisdiction"; *cf. The Wildenhus*, 1886 (120 U.S. 1), where the American Courts exercised jurisdiction in the case of a crime committed on a foreign vessel in an American port.

REGINA v. LESLEY (1860).

Bell's Crown Cases, 220; 29 L.J. M.C. 97.

The master of a British ship may detain Chilian outlaws on board his ship, against their will, while in Chilian waters, by agreement with the Chilian Government; but he cannot lawfully transport them on the high seas under such agreement, because on the high seas he is subject to English law.

Case.—The prosecutor and others were Chilians who were banished by their Government from Chili to England. The Government of Chili hired the defendant to take the banished men to England in his vessel, then lying in the territorial waters of Chili. This plan was carried out, and the defendant was prosecuted in England for false imprisonment.

Judgment (Erle, C. J.).—"Then, can the conviction be sustained for that which was done within the Chilian waters? We answer no.

"We assume that in Chili the act of the Government toward its subjects was lawful; and although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign State, yet in other respects she is subject to the laws of that State as to acts done to the subjects thereof. We assume that the Government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the Government and under its authority. In *Dobree* v. *Napier*, 2 Bing. N.C., 781, the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of Portugal, in her own territory had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman seizing an English vessel, could justify the act under the employment of the Queen. We think that the acts of the defendant in Chili became lawful on the same principle, and that there is therefore no ground for the conviction.

"The further question remains, Can the conviction be sustained for that which was done out of the Chilian territory? and we think it can. It is clear that an English ship on the high sea, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship are as much amenable to English law as they would be on English soil.

"In *Regina* v. *Sattler*, Dears. & Bell's C.C., 525, this principle was acted on, so as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea. The same principle has been laid down by foreign writers on international law, among which it is enough to cite Ortolan, 'Sur la Diplomatie de la Mer,' liv. 2, cap. 13.

"The Merchant Shipping Act, 17 & 18 Vict. c. 104, sec. 267, makes the master and seamen of a British ship responsible for all

offences against property or person committed on the sea out of her Majesty's dominions as if they had been committed within the jurisdiction of the Admiralty of England. Such being the law, if the act of the defendant amounted to a false imprisonment, he was liable to be convicted. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment.

"It may be that transportation to England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects; but for an English ship the laws of Chili, out of that State, are powerless, and the lawfulness of the acts must be tried by English law. For these reasons, to the extent above mentioned, the conviction is affirmed."

Note.—While a British ship is within the territorial waters of a foreign country it is subject to the jurisdiction and laws of that country as well as to English jurisdiction, but on the high seas the English jurisdiction is exclusive, and if an offence against English law is committed there, the offender is liable in the English Court.

III. Piracy.

Cf. Oppenheim, ss. 272–280; Lawrence, 102; Hall, p. 252; Westlake, p. 177.

UNITED STATES v. SMITH, 1820.

United States Supreme Court (6 Wheaton 153).

What is piracy by the law of nations.

Case.—The prisoner, who was indicted for piracy, had mutinied, with other members of the crew of a private armed vessel, the *Crcolio* (commissioned by the Government of Buenos Ayres, a

colony then at war with Spain), and confined their officers, and seized by violence another private armed vessel lying in the port, and had then plundered and robbed a Spanish vessel on the high seas. The Circuit Court divided on the question whether this was piracy as defined by the law of nations, so as to be punishable under the Act of Congress, of March 3, 1819, and thereupon the question was certified to the Supreme Court for its decision.

Judgment.—Mr. Justice Story delivered the opinion of the Court: "The Act of Congress upon which this indictment is founded provides that if any person or persons whatsoever shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, &c., be punished with death.

. . . "It is next to be considered whether the crime of piracy is defined by the law of nations with reasonable certainty. What the law of nations on this subject is may be ascertained by consulting the works of jurists, writing professedly on public law, or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law. There is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no reasonable doubt.

"The common law, too, recognises and punishes piracy as an offence, not against its own municipal code but as an offence against the law of nations (which is part of the common law), as an offence against the universal law of society, a pirate being deemed an enemy of the human race. Indeed, until the statute of 28th of Henry VIII., ch. 15, piracy was punished in England only in the Admiralty as a civil law offence; and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offence. Sir Charles Hedges,

in his charge at the Admiralty Sessions, in the case of *Rex* v. *Dawson*, 5 State Trials, declared in emphatic terms that 'piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty.' Sir Leoline Jenkins, too, on a like occasion, declared that 'a robbery, when committed upon the sea, is what we call piracy'; and he cited the civil-law writers, in proof.

"And it is manifest from the language of Sir William Blackstone, 4 Bl. Comm. 73, in his comments on piracy, that he considered the common law definition as distinguishable in no essential respect from that of the law of nations. So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have, therefore, no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by sec. 5 of the Act of 1819."

Note.—Piracy by the law of nations has a well-recognised meaning, and every State has jurisdiction over pirates seized by its vessels. Pirates, however, in a common insurance policy may mean only persons who plunder indiscriminately for their private gain and not persons who simply operate against the property of a particular State for a public political end, the end of establishing a Government (*Republic of Bolivia* v. *Indemnity Mutual Marine Insurance Co., Ltd.* 1909, 1 K.B. 785).

THE MAGELLAN PIRATES, 1853.

1 Spinks' Eccl. & Adm. Rep. 81.

Insurgents may become, by depredations against foreign powers, pirates as well as insurgents.

Case.—In 1851 there was a state of insurrection in some of the States of Chili; and the prisoners and garrison of a convict settlement in the Straits of Magellan seized a vessel and then started to prey upon British shipping. Their vessel was captured by an English man-of-war and they were tried in England for piracy under the 13 & 14 Vict. ch. 26 and convicted.

Judgment (Lushington, J.).—"I apprehend that in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts, and piratical acts are robbery and murder upon the high seas. I do not believe that, even where human life was at stake, our courts of common law ever thought it necessary to extend their inquiry further, if it was clearly proved against the accused that they had committed robbery and murder upon the high seas. In that case they were adjudged to be pirates, and suffered accordingly. . . . It was never, so far as I am able to find, deemed necessary to inquire whether the parties so convicted had intended to rob or to murder on the high seas indiscriminately. Though the municipal law of different countries may and does differ in many respects as to its definition of piracy, yet I apprehend that all nations agree in this, that acts such as those which I have mentioned, when committed on the high seas, are piratical acts, and contrary to the law of nations. . . . I think it does not follow that, because persons who are rebels and insurgents may commit against the ruling powers of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels and insurgents may not commit piratical acts against the subjects of other States, espe-

cially if such acts were in no degree with the insurrection or rebellion. Even an independent State may, in my opinion, be guilty of piratical acts. What were the Barbary tribes of olden times? what are many of the African tribes at this moment? It is, I believe, notorious that tribes now inhabiting the African coast of the Mediterranean will send out their boats and catch any ships becalmed upon their coasts?

"Are they not pirates because, perhaps, their sole livelihood may not depend upon piratical acts? I am aware that it has been said that a State cannot be piratical, but I am not disposed to assent to such a *dictum* as a universal proposition."

Note.—Normally, where insurgents confine their hostile acts to the Government they are attacking, their ships are not to be treated as pirates by foreign Powers. In the American case of *The United States* v. *The Ambrose Light*, 1885 (25 Fed. 408), however, where a vessel was brought into an American Court as a prize, it was held that the ship, which was the lawful property of insurgents of the Republic of Columbia, unrecognised by the United States Government, and which was taken by a United States gunboat, when carrying soldiers and arms to assist in the blockade of Cartagena in the possession of the Government, was lawfully seized as being on a piratical expedition.

CHAPTER VIII.

EXTRADITION.

Cf. Oppenheim, ss. 327–332; Lawrence, 110–111; Hall, p. 57; Westlake, pp. 242–252.

UNITED STATES v. RAUSCHER.

Supreme Court of the United States, 1886.

119 United States Reports, 407.

There is no certain rule of international law requiring States to deliver up fugitives from justice from other States. A person extradited under treaty can be tried for that offence only for which he was extradited.

Case.—The prisoner was extradited from England to the United States on a charge of murder: he was tried in America for assault, and the question before the Supreme Court was whether the change in the charge at the trial was justifiable.

Judgment.—"The treaty with Great Britain, under which the defendant was surrendered by that Government to ours upon a charge of murder, is that of August 9, 1842. . . . The tenth article of the treaty is as follows: 'It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall

seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.'

"Not only has the general subject of the extradition of persons, charged with crime in one country, who have fled to and sought refuge in another, been matter of much consideration of late years by the executive departments and statesmen of the Governments of the civilised portion of the world, by various publicists and writers on international law, and by specialists on that subject, as well as by the courts and judicial tribunals of different countries, but the precise questions arising under this treaty, as presented by the certificate of the judges in this case, have recently been very much discussed in this country, and in Great Britain.

"It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent Government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discre-

tion of the Government whose action was invoked; and it has never been recognised as among those obligations of one Government towards another which rest upon established principles of international law.

"Whether in the United States, in the absence of any treaty on the subject with a foreign nation from whose justice a fugitive may be found in one of the States, and in the absence of any Act of Congress upon the subject, a State can, through its own judiciary or executive, surrender him for trial to such foreign nation, is a question which has been under consideration by the Courts of this country without any very conclusive result. . . .

"The treaty of 1842 being the supreme law of the land, which the Courts are bound to take judicial notice of and to enforce in any appropriate proceeding the rights of persons growing out of that treaty, we proceed to inquire, in the first place, so far as pertinent to the question certified by the circuit judges, into the true construction of the treaty. We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offence than that for which he had been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition because it can hardly be supposed that a Government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offence, of a character which justified the Government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding Government without any limitation, implied or otherwise, upon its prosecution of the party. In exercising its discretion, it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty and person, while it would not be willing to do this on

account of minor misdemeanours or of a certain class of political offences in which it would have no interest or sympathy. Accordingly, it has been the policy of all Governments to grant an asylum to persons who have fled from their homes on account of political disturbances and who might be there amenable to laws framed with regard to such subjects, and to the personal allegiance of the party. In many of the treaties of extradition between the civilised nations of the world, there is an express exclusion of offenders against such laws, and in none of them is this class of offences mentioned as being the foundation of extradition proceedings. Indeed, the enumeration of offences in most of these treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offences, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others.

"It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognised public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offences enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable to suppose that any demand for rendition framed upon a general representation to the Government of the asylum (if we may use such an expression) that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offence with which he was charged, and even without specifying an offence mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offence than that for which he was demanded, and which is described in the treaty. There

would, under that view of the subject, seem to be no need of a description of a specific offence in making the demand. But, so far from this being admissible the treaty not only provides that the party shall be charged with one of the crimes mentioned, to wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery or the utterance of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offence, and that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offence is charged to have been committed, there is very little use for this particularity in charging a specific offence, requiring that offence to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it. Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offence, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a Government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure.

" If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it,

the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them. . . .

"Upon a review of the decisions of the Federal and State Courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorised to state that the weight of authority and of sound principle are in favour of the proposition, that a person who has been brought within the jurisdiction of the Court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."

Note.—Extradition in every country being regulated by treaty, each case of extradition depends on the particular treaty under which it was carried out. But certain general principles apply to all cases, and in this decision the rule was affirmed that a person can only be tried for the crime for which he was extradited. In 1890, however, the Governments of the United States and Great Britain agreed by treaty that the extraditing Power might consent to the trial of a surrendered person for facts other than those for which he was surrendered, if such facts constituted an extraditable crime.

English Extradition Legislation.

33 and 34 Vict. ch. 52, 1870.

An Act for amending the Law relating to the Extradition of Criminals.

Whereas it is expedient to amend the law relating to the surrender to foreign States of persons accused or convicted of the commission of certain crimes within the jurisdiction of such States, and to the trial of criminals surrendered by foreign States to this country:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as "The Extradition Act, 1870."

2. Where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign State.

Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement.

Every such order shall be laid before both Houses of Parliament within six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the *London Gazette*.

3. The following restrictions shall be observed with respect to the surrender of fugitive criminals:

(1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the Court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character:

(2) A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded:

(3) A fugitive criminal who has been accused of some offence within English jurisdiction not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise:

(4) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.

4. An Order in Council for applying this Act in the case of any foreign State shall not be made unless the arrangement—

(1) provides for the determination of it by either party to it after the expiration of a notice not exceeding one year; and,

(2) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act.

5. When an order applying this Act in the case of any foreign State has been published in the *London Gazette*, this Act (after the date specified in the order, or, if no date is specified, after the date of the publication), shall, so long as the order remains in force, but subject to the limitations, restrictions, conditions, exceptions, and qualifications, if any, contained in the order, apply in the case of such foreign State. An Order in Council shall be conclusive evidence that the arrangement therein referred to complies with the requisitions of this Act, and that this Act applies in the case of the foreign State mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatever.

6. Where this Act applies in the case of any foreign State, every fugitive criminal of that State who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any Court of Her Majesty's dominions over that crime.

7. A requisition for the surrender of a fugitive criminal of any foreign State, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign State. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

8. A warrant for the apprehension of a fugitive criminal,

whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—

1. by a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and
2. by a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction.

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may if he think fit order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged.

A fugitive criminal, when apprehended on a warrant issued without the order of a Secretary of State, shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought and the prisoner shall accordingly be brought before a police magistrate.

A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the surrender of such criminal.

9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be,

as if the prisoner were brought before him charged with an indictable offence committed in England.

The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

If he commits such criminal to prison he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit.

11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus.

Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the Court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered

on the decision of the Court) to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

It shall be lawful for any person to whom such warrant is directed and for the person so authorised as aforesaid to receive, hold in custody, and convey within the jurisdiction of such foreign State the criminal mentioned in the warrant; and if the criminal escapes out of any custody to which he may be delivered on or in pursuance of such warrant, it shall be lawful to retake him in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

12. If the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the United Kingdom within two months after such committal, or, if a writ of habeas corpus is issued, after the decision of the Court upon the return to the writ, it shall be lawful for any judge of Her Majesty's Superior Courts at Westminster, upon application made to him by or on behalf of the criminal, and upon proof that reasonable notice of the intention to make such application has been given to a Secretary of State, to order the criminal to be discharged out of custody, unless sufficient cause is shown to the contrary.

13. The warrant of the police magistrate issued in pursuance of this Act may be executed in any part of the United Kingdom in the same manner as if the same had been originally issued or subsequently indorsed by a justice of the peace having jurisdiction in the place where the same is executed.

14. Depositions or statements on oath, taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.

15. Foreign warrants and depositions or statements on oath,

and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act if authenticated in manner provided for the time being by law or authenticated as follows :

(1) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign State where the same was issued ;

(2) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign State where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require ; and

(3) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign State where the conviction took place ; and

if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice, or some other minister of State : And all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

Crimes committed at sea.

16. Where the crime in respect of which the surrender of a fugitive criminal is sought was committed on board any vessel on the high seas which comes into any port of the United Kingdom, the following provisions shall have effect :

1. This Act shall be construed as if any stipendiary magistrate in England or Ireland, and any sheriff or sheriff substitute in Scotland, were substituted for the police magistrate throughout this Act, except the part relating to the execution of the warrant of the police magistrate :

2. The criminal may be committed to any prison to which the person committing him has power to commit persons accused of the like crime :

3. If the fugitive criminal is apprehended on a warrant issued without the order of a Secretary of State, he shall be brought before the stipendiary magistrate, sheriff, or sheriff substitute who issued the warrant, or who has jurisdiction in the port where the vessel lies, or in the place nearest to that port.

* * * * *

General Provisions.

19. Where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this Act is surrendered by that foreign State, such person shall not, until he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded. . . .

24. The testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign State in like manner as it may be obtained in relation to any civil matter under the Act of the session of the nineteenth and twentieth years of the reign of Her present Majesty, chapter one hundred and thirteen, intituled "An Act to provide for taking evidence in Her Majesty's Dominions in relation to civil and commercial matters pending before foreign tribunals;" and all the provisions of that Act shall be construed as if the term civil matter included a criminal matter, and the term cause included a proceeding against a criminal : Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

25. For the purposes of this Act, every colony, dependency, and constituent part of a foreign State, and every vessel of that State shall (except where expressly mentioned as distinct in this

Act) be deemed to be within the jurisdiction of and to be part of such foreign State.

Repeal of Acts.

27. The Acts specified in the third schedule to this Act are hereby repealed as to the whole of Her Majesty's dominions; and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act), in the case of the foreign States with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act.

Provided that if any proceedings for or in relation to the surrender of a fugitive criminal have been commenced under the said Acts previously to the repeal thereof, such proceedings may be completed, and the fugitive surrendered, in the same manner as if this Act had not passed.

FIRST SCHEDULE.

List of Crimes.

The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

Murder, and attempt and conspiracy to murder.

Manslaughter.

Counterfeiting and altering money and uttering counterfeit or altered money.

Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered.

Embezzlement and larceny.

Obtaining money or goods by false pretences.
Crimes by bankrupts against bankruptcy law.
Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force.
Rape.
Abduction.
Child stealing.
Burglary and housebreaking.
Arson.
Robbery with violence.
Threats by letter or otherwise with intent to extort.
Piracy by law of nations.
Sinking or destroying a vessel at sea, or attempting or conspiring to do so.
Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.
Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

Note.—The Act, as appears from sec. 27, has to be read together with the treaties with particular countries, and it is necessary that both the Act and the treaty should authorise the extradition in any particular case. An amending Act was passed in 1873 (27 Vict., ch. 60) which extended the list of extraditable crimes.

Non-Extradition of Political Criminals.

Cf. Oppenheim, ss. 333–340; Lawrence, 108.

IN RE CASTIONI.

[1891], 1 Q.B. 149; 60 L.J. M.C. 22.

What constitutes a political offence for the purpose of extradition.

Case.—This was an application for a writ of habeas corpus on behalf of Angelo Castioni, who had been arrested in England

on the requisition of the Swiss Government, and brought before the magistrate at the police court at Bow Street, and by him committed to prison for the purpose of extradition, on a charge of wilful murder, alleged to have been committed in Switzerland.

The prisoner was charged with the murder of Luigi Rossi, by shooting him with a revolver on September 11, 1890, in the town of Bellinzona, in the canton of Ticino, in Switzerland. The deceased, Rossi, was a member of the State Council of the canton of Ticino, and was about twenty-six years of age. The prisoner, Castioni, was a citizen of the same canton; he had resided for seventeen years in England, and arrived at Bellinzona on September 10, 1890. For some time previous to this date much dissatisfaction had been felt and expressed by a large number of the inhabitants of Ticino at the mode in which the political party then in power were conducting the government of the canton. A request was presented to the Government for a revision of the Constitution of the canton, under art. 15 of the Constitution. The Government having declined to take a popular vote on the question of the revision of the Constitution, on September 11, 1890, a number of the citizens of Bellinzona, among whom was Castioni, seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested and bound or handcuffed several persons connected with the Government, and forced them to march in front of the armed crowd to the municipal palace. Admission to the palace was demanded in the name of the people, and was refused by Rossi and another member of the Government, who were in the palace. The crowd then broke open the outer gate of the palace and rushed in, pushing before them the Government officials whom they had arrested and bound; Castioni, who was armed with a revolver, was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards. Some other shots were fired, but no one else was injured. Two witnesses, who were present when the shot was fired, and were

called before the magistrate at Bow Street, identified Castioni as the person who fired the shot. There was no evidence that Castioni had any previous knowledge of Rossi. The crowd then occupied the palace, disarmed the gendarmes who were there, and imprisoned several members of the Government. A provisional Government was appointed, of which Bruni was a member, and assumed the government of the canton, which it retained until dispossessed by the armed intervention of the Federal Government of the Republic.

The magistrate was of opinion that the identification of Castioni was sufficient, and held upon the evidence that the bar to extradition specified in sec. 3 of the Extradition Act, 1870: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the Court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character," did not exist, and committed Castioni to prison. By the Extradition Treaty with Switzerland, dated November 26, 1880, article 11: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try and punish him for an offence of a political character."

Judgment (Denman, J.).—"I am unable to entertain a doubt that this is a case in which we ought to order that the prisoner be discharged. There has been no legal decision as yet upon the meaning of the words contained in the Act of 1870, upon the true meaning of which this case mainly depends. We have had many definitions suggested, and great light has been thrown upon the possible and probable meaning of the words by the arguments that have been addressed to us, applying not only the language of judges, but language used in text-books, language used by great political authorities, and in one case by a most learned philosopher. I think it has been useful in such a case as this

that we should hear a discussion as to the possible meaning of the words, as it has occurred that they ought to be construed to people such as those whose opinions have been cited, and especially I may apply that observation to the case of my very learned brother whose assistance we have on this occasion in deciding the present case. I do not think it is necessary or desirable that we should attempt to put into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things which bring a particular case within the description of an offence of a political character. I wish, however, to express an opinion as to one matter upon which I entertain a very strong opinion. That is, that if the description given by Mr. John Stuart Mill, 'Any offence committed in the course of or furthering of civil war, insurrection, or political commotion,' were to be construed in the sense that it really means any act which takes place in the course of a political rising without reference to the object and intention of it, and other circumstances connected with it, I should say that it was a wrong definition and one which could not be legally applied to the words in the Act of Parliament. Sir Charles Russell suggested that 'in the course of' was to be read with the words following, 'or in furtherance of,' and that 'in furtherance of' is equivalent to 'in the course of.' I cannot quite think that this was the intention of the speaker, or is the natural meaning of the expression; but I entirely concur with the observation of the Solicitor-General that in the other sense of the words, if they are not to be construed as merely equivalent expressions, it would be a wrong definition. I think that in order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act.

"Sir Charles Russell has argued that in every case it is for the party seeking extradition to bear the onus of affirmatively bringing it within the meaning of those words. On the other hand, it has been contended that if there be an extraditable offence, the onus is upon the person seeking the benefit of those words to show a case in which extradition can be avoided. I do not myself think that it is possible to decide a case such as this, or the true meaning of those words, by applying any such test as on whom is the onus. I do not think it is intended that a scrap of a *prima facie* case on the one side should have the effect of throwing upon the other side the onus of proving or disproving his position. I look at the words of the Act themselves and I think that they are against any such narrow technical mode of dealing with the case. The words of sec. 3, subdivision 1, are 'a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character.' The section itself begins: 'The following restrictions shall be observed with respect to the surrender of fugitive criminals.' There is nothing said as to upon whom is the *onus probandi*, or that it shall be made to appear by one side or the other in such a case. It is a restriction upon the surrender of a fugitive criminal, and however it appears, if it does appear, that the act was, in the judgment of the Court, an offence which would otherwise be an offence according to the laws of this country, but an offence of a political character, then wholly irrespective of any doctrine of onus on the one side or the other, that is within the jurisdiction, and he cannot be surrendered. It was at first contended, in opposition to the application for a habeas corpus, that if the magistrate upon this question once made up his mind, the Court had no jurisdiction to deal with it. It appears to me that this proposition cannot be maintained on the very face of the Act itself, which requires by sec. 11 that the magistrate shall inform the prisoner that he may apply for a habeas corpus, and if he is entitled to apply for a habeas corpus, I think it follows that this Court must have power to go into the whole matter, and in some cases, certainly if there be fresh evidence,

or perhaps upon the same evidence, might take a different view of the matter from that taken by the magistrate.

"It seems to me that it is a question of mixed law and fact—mainly indeed of fact—as to whether the facts are such as to bring the case within the restriction of sec. 3, and to show that it was an offence of a political character. I do not think it is disputed, or that now it can be looked upon as in controversy, that there was at this time existing in Ticino a state of things which would certainly show that there was more than a mere small rising of a few people against the law of the State. I think it is clearly made out by the facts of this case that there was something of a very serious character going on—amounting, I should go so far as to say, in that small community, to a state of war. There was an armed body of men who had seized arms from the arsenal of the State; they were rushing into the municipal council chamber in which the Government of the State used to assemble; they demanded admission; admission was refused; some firing took place; the outer gate was broken down; and I think it also appears perfectly plain from the evidence in the case that Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of one member of the Government. Some time before he arrived with his pistol in his hand at the seat of government, he had gone with multitudes of men, armed with arms from the arsenal, in order to attack the seat of government, and I think it must be taken that it is quite clear that from the very first he was an active party, one of the rebellious party who was acting and in the attack against the Government. Now, that being so, it resolves itself into a small point, depending on the evidence which was taken before the magistrate, and anything that we can collect from the evidence that we have before us and from the whole circumstances of the case. . . .

"The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object,

and as part of the political movement and rising in which he was taking part. . . .

"I have carefully followed the discussion as to the facts of the case, and if it were necessary I could go through them all one by one, and point out, I think, that, looking at the way in which that evidence was given, and at the evidence itself, there is nothing in my judgment to displace the view which I take of the case, that at the moment at which Castioni fired the shot the reasonable presumption is, not that it is a matter of absolute certainty (we cannot be absolutely certain about anything as to men's motives), but the reasonable assumption is that he, at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi, as far as we know, fired that shot; that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done intending it to be in furtherance of, the very object which the rising had taken place in order to promote, and to get rid of the Government, who, he might, until he had absolutely got into the place, have supposed were resisting the entrance of the people to that place. That, I think, is the fair and reasonable presumption to draw from the facts of the case. I do not know that it is necessary to give any opinion as to the exact moment when the shot was fired; there is some conflict about it. There is evidence that there was great confusion; there is evidence of shots fired after the shot which Castioni fired; and all I can say it that, looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he acted in the furtherance of the unlawful rising to which at that time he was a party, and an active party—a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer."

Hawkins, J., in the course of his judgment, said: "Now what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought

whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his History of the Criminal Law of England in vol. ii., pp. 70, 71. I will not do more than refer to the interpretations, other than those with which he agrees, which have been given upon this expression, 'political character'; but I adopt his definition absolutely. 'The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, &c., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration.' The question has come under judicial consideration, and having had the opportunity before this case arose of carefully reading and considering the views of my learned brother, having heard all that can be said upon the subject, I adopt his language as the definition that I think is the most perfect to be found or capable of being given as to what is the meaning of the phrase which is made use of in the Extradition Act. . . .

"I cannot help thinking that everybody knows there are

many acts of a political character done without reason, done against all reason; but at the same time, one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over."

Note.—In the case of *In re Meunier* (1894, 2 Q.B. 415) an anarchist who had caused two explosions in Paris resulting in the death of two persons was ordered to be extradited; and it was held that to constitute a political offence there must be two or more parties in a State each seeking to impose the Government of its choice on the other. As anarchists were inimical to all Governments, the prisoner's offence was held not to be political.

Limits of Extradition.

THE QUEEN v. GANZ, 1882.

L.R. 9 Q.B.D. 93; 51 L.J. Q.B. 419.

The provisions in a treaty for the extradition of criminals are not confined to persons who are the subjects of the State requiring extradition, but apply to all persons who have committed any of the specified crimes within the jurisdiction of that State, of whatever nationality they may be.

Case.—This was an application for a writ of habeas corpus to obtain the release of Mr. Ganz, who had been arrested on an extradition warrant and committed with a view to his extradition in respect of a crime committed in Holland. He was said to be a citizen of the United States.

Judgment (Pollock, B.).—"I think that this application must be refused. Two points are made on behalf of the prisoner which are of importance as involving matter of principle affecting the

liberty of the subject. The first of them is this: it is said that the prisoner is not subject to the extradition law as existing between this country and the Netherlands, by reason of his not being a subject of the Netherlands. It is said that the evidence before the magistrate showed him to be a naturalised subject of the United States, and this evidence was also supplemented by an affidavit stating that not only has the prisoner been naturalised in the United States, but that also there is no reason to believe that he was born in the Netherlands; on the contrary, it says that he has reason to believe that he was born in a city in Hungary. Therefore it is contended that the Extradition Treaty between this country and the Netherlands does not apply, and that the prisoner cannot be given up to the Government of the Netherlands. This matter, no doubt, depends not only on the English statute, but also on the terms of the treaty; but before alluding to the treaty I would say that the leading principle which underlies all questions of nationality as applied to crime committed within any particular country is this: whatever rights, civil or otherwise, a man may have which may be affected by his domicile, it is and must be perfectly clear by the law of all nations that each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction; otherwise the criminal law could not be administered according to any civilised method."

Note.—The decision in this case turned actually on the construction of the particular extradition treaty between Great Britain and the Netherlands. But the principle is applied generally that extradition treaties allow for the delivering up to the authorities of the country where the crime has taken place of any person, whatever his nationality, who has fled to another country, unless the crime is of a political character, or unless the fugitive is a subject of that country. Even in the latter case some of the more recent extradition treaties provide for the mutual giving up of such fugitives. *Cf. Rex* v. *Governor of Brixton Prison* (L.R. 1912, 2 K.B. 678), where a British subject charged with having committed a crime in France was ordered to be extradited to France. In England it is necessary that any case of extradition should be in conformity with the provisions both of the Extradition Act, 1870, which is the general statute providing for extradition, and the particular treaty with the foreign country claiming the

extradition. Unless it is in conformity with both instruments it is not legal.

Formalities of Extradition.

Cf. Oppenheim, s. 332.

AWARD OF THE HAGUE TRIBUNAL IN THE SAVARKAR CASE.

American Journal of International Law, April 1911, p. 52.

There is no general rule of international law imposing any obligation on the Power which has in its custody a prisoner to restore him to a country to which he had made his escape, because of a mistake committed by the foreign agents who delivered him up to that Power.

Case.—Savarkar was an Indian revolutionary who was sent from England to India to be prosecuted for abetment of murder, the crime in connection with which he was charged having been carried out in connection with a political movement. He was placed on board the English mail steamer *Morea*, which called at Marseilles, and the English authorities had informed the French Government that the boat was to touch at the French port, and the French Minister of the Interior had requested the Prefect of the department to take measures necessary to prevent any attempt to further the prisoner's escape. While the *Morea* was at Marseilles, Savarkar contrived to escape and swim to the shore, but the alarm was raised, and as soon as he landed he was arrested by a brigadier of the French maritime *gendarmerie* and taken back to the vessel. The question whether the English authorities were bound to restore him to France, because of the irregular character of the surrender, was referred to arbitration at The Hague.

Judgment.—The award of the Tribunal, after reciting in detail the facts of the escape and arrest, concluded :

"Whereas, having regard to what has been stated, it is manifest that the case is not one of recourse to fraud or force

in order to obtain possession of a person who had taken refuge in foreign territory, and that there was not, in the circumstances of the arrest and delivery of Savarkar to the British authorities and of his removal to India, anything in the nature of a violation of the sovereignty of France, and that all those who took part in the matter certainly acted in good faith and had no thought of doing anything unlawful.

"Whereas, in the circumstances cited above, the conduct of the brigadier not having been disclaimed by his chiefs before the morning of July 9, that is to say before the *Morea* left Marseilles, the British police might naturally have believed that the brigadier had acted in accordance with his instructions, or that his conduct had been approved.

"Whereas, while admitting that an irregularity was committed by the arrest of Savarkar, and by his being handed over to the British police, there is no rule of international law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.

"For these reasons: The arbitral Tribunal decides that the Government of his Britannic Majesty is not required to restore the said Vinayak Damodar Savarkar to the Government of the French Republic."

Note.—The facts of the case are so peculiar, and the finding is so carefully limited by its wording, that the judgment can hardly be taken as declaratory of any general principle. In an ordinary case a political prisoner escaping to a foreign country would be immune against extradition, and it is questionable whether it would be the duty of the State to which he had escaped to concur in the erroneous action of one of its police officers in delivering him up to the authorities of the other country. Here, however, the arbitration tribunal felt itself justified in taking account of the special circumstances which supported the position of the British authorities, and correspondingly weakened the French claim. The case seems to illustrate the character of international arbitration. As France and England could not agree on what was to be done in the circumstances of the irregular surrender of the Indian prisoner, the whole question was submitted to the Hague Tribunal, which investigated the facts very closely, and finally gave an award inculpating nobody and designed to offend neither party.

CHAPTER IX.

IMMUNITIES FROM TERRITORIAL JURISDICTION.

I. Privileges of Monarchs in Foreign Countries.

Cf. Oppenheim, s. 348; Lawrence, 105.

HULLETT v. THE KING OF SPAIN, 1828.

2 Bligh, N.S. 31; 28 R.R. 56.

A Sovereign or a State can sue in the Courts of another country but cannot be sued.

Case.—This was an action brought by the King of Spain for an account of money, deposited with an English firm. The defendants demurred on the ground that a foreign sovereign could not sue in a Court of equity since no decree could be enforced against him.

Judgment.—The Lord Chancellor (Lord Lyndhurst) in the course of the argument said:

"That a king is entitled to sue as king cannot be disputed. As a suitor he submits himself to the jurisdiction of the Court; otherwise it might be an objection that you could not control him. But if he comes here as a suitor he submits himself to the jurisdiction. Has not the sovereign power of another country the common privilege of mankind?"

Note.—The decision has been repeatedly followed, and it is clear that a foreign sovereign may sue in the Courts. *Cf. Duke of Brunswick* v. *King of Hanover* (6 Beavan 1; and 2 House of Lords Cases I.). If a foreign

sovereign submits to the jurisdiction by invoking it, the Courts can entertain certain proceedings against him. "Where a foreign sovereign or State comes into the municipal Courts of this country for the purpose of obtaining a remedy, then by way of defence to that proceeding—by way of counterclaim, if necessary, to the extent of defeating that claim—the person sued here may file a cross-claim or take any other proceeding against that sovereign or State for the purpose of enabling complete justice to be done between them"; per James, L.J., in *Strousberg* v. *Republic of Costa Rica* (44 L.T. Rep. 199). "And a foreign sovereign may be named as defendant for the purpose of giving him notice of the claim which a plaintiff makes to funds in the hands of a third person or trustee over whom the Court has jurisdiction" (*ibid.*). But an order cannot be executed against a foreign sovereign. *Cf. Vavasseur* v. *Krupp* (1878, L.R. 9 Ch.D. 351), where the Court refused to order the destruction of shells, bought by the Mikado in Germany, on account of the infringement of an English patent.

A foreign sovereign who resides here and enters into a contract here under an assumed name as if a private individual does not thereby submit himself to the jurisdiction, and he cannot be sued for breach of the contract (*Mighell* v. *Sultan of Johore*, 1894, 1 Q.B. 149). And a foreign ruling prince cannot be cited as a co-respondent in a divorce suit in England: *Statham* v. *Statham, and the Gaekwar of Baroda* (1912, P. 92).

If, however, a foreign sovereign is at the same time a subject of the State in which he is sued and is sued in his capacity of subject, he does not enjoy immunity. *Cf. Duke of Brunswick* v. *King of Hanover* (6 Beavan 1), where it was held that the King of Hanover, who was also an English peer, was liable to be sued in English Courts in respect of any acts done by him as an English subject.

II. Right of a State to Sue abroad.

UNITED STATES OF AMERICA v. WAGNER, 1867.

L.R., 2 Chancery Appeals, 582.

A Republic may sue in English Courts in its own name; and it need not have or create an officer to maintain a suit on its behalf.

Case.—The bill in this suit was filed by *The United States of America* against agents of the Confederacy, doing business at Liverpool.

The bill alleged that the defendants had large quantities of cotton consigned to them—that in 1865 the rebellion was suppressed and that all the property held by the Government of the so-called Confederate States, including all moneys, goods, and ships in the power of the defendants, had vested in the plaintiffs. The bill prayed for an account, and for an order of payment of the money in the hands of the defendants, and a delivery of the goods and cotton in their hands. The defendants demurred generally, objecting that the bill should put forward the President of the United States or some State officer, upon whom process might be served, and who might answer a cross-bill.

Judgment (Lord Cairns, L.J.).—"It is admitted that, upon the statements in the bill, it must be taken that the property claimed in the suit belongs to the United States of America, a foreign sovereign State, adopting the republican form of government, and recognised and treated with as such, and under that style, by Her Majesty; but it is contended that this foreign State, being a republic, cannot sue in its own name, and must either associate with it as plaintiff or proceed in the name of the President of the Republic, or some other officer of state.

"A proposition so startling, so grave in its consequences, and in such apparent antagonism to the rules, that the proper plaintiff is to be sought in the owner of the subject-matter of the suit, and that a foreign State is at liberty to sue in any of our Courts, would seem to require some argument and authority to support it. It was contended then, that when a monarch sues in our Courts, he sues as the representative of the State of which he is the sovereign; that the property claimed is looked upon as the property of the people or State and that he is permitted to sue, not as for his own property, but as the head of the executive Government of the State to which the property belongs; and it was contended, in like manner, that when the property belongs to a republic, the head of the executive, or in other words the President, ought to sue for it.

"This argument, in my opinion, is founded on a fallacy. The

sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers over the property which he seeks to recover. But in the Courts of Her Majesty, as in diplomatic intercourse with the Government of Her Majesty, it is the sovereign, and not the State, or the subjects of the sovereign, that is recognised. From him, and as representing him individually, and not his State or kingdom, is an ambassador received. In him individually, and not in a representative capacity, is the public property assumed by all other States, and by the Courts of other States, to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the State itself, and not in any officer of the State. It is from the State that an ambassador is accredited, and it is with the State that the diplomatic intercourse is conducted.

"The case of the *Columbian Government* v. *Rothschild*, 1 Sim. 94, however, was said to be, and the Vice-Chancellor appears to have considered that it was, a binding authority against a suit in this form. I cannot so view that case. The bill was filed in the name of the State of Columbia, and if this bill had been filed in the name of the Government of the United States, the case would have been analogous. Dealing with the words before him, Sir John Leach appears to have held, and to have most properly held, that an unknown and undefined body, such as the Government of a State, could not sue by that quasi-corporate name, and the expressions in his judgment seem to me to intimate no more than that if the persons so described could sue at all they must come forward as individuals, and show that they were entitled to represent their State.

"Nothing could be more unreasonable than to suppose that by observations of this kind Sir John Leach meant to decide for the first time that a republic could not sue in its own name, but must have, or must create, some officer to maintain a suit on its behalf.

"I think the demurrer in this case must be overruled."

III. Immunity of Public Vessels of a Foreign State from Suit.

Cf. Oppenheim, s. 450; Lawrence, s. 107; Hall, pp. 161 and 195–196; Westlake, p. 254.

THE SCHOONER "EXCHANGE" v. M'FADDON.

Supreme Court of the United States, 1812 (7 Cranch, 116).

The public property of a foreign sovereign or a foreign State is immune from suits in the national Courts.

Case.—The schooner *Exchange*, owned by John M'Faddon and William Greetham, sailed from Baltimore, October 27, 1809, for St. Sebastian, in Spain. On December 30, 1810, she was seized by the order of Napoleon Bonaparte; and was then armed and commissioned as a public vessel of the French Government, under the name of *Balaou*. On a voyage to the West Indies, she put into the port of Philadelphia, in July 1811, and on August 24 was libelled by the original owners. As no claimant appeared, Mr. Dallas, the attorney of the United States for the district of Pennsylvania, filed a suggestion that, inasmuch as there was peace between France and the United States, the public vessels of the former may enter into the ports and harbours of the latter and depart at will without seizure or detention in any way.

Judgment (Marshall, C.J.).—"This case involves the very delicate and important inquiry whether an American citizen can assert, in an American Court, a title to an armed national vessel, found within the waters of the United States. The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limi-

tation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restrictions. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

"The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

"This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

"A nation would justly be considered as violating its faith although that faith might not be expressly plighted, which should suddenly and without previous notice exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilised world.

"This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station,

though not expressly stipulated, are reserved by implication, and will be extended to him.

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation. First, one of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory. If he enters that territory with the knowledge and licence of its sovereign, that licence, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation. Why has the whole civilised world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the licence has been obtained. The character to whom it is given and the object for which it is granted equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case. Should one sovereign enter the territory of another without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the Court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

"(2) A second case, standing on the same principles with the first, is the immunity which all civilised nations allow to foreign ministers. Whatever may be the principle on which this immu-

nity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory; he is supposed to assent to it. This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess . . .

"(3) A third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, is where he allows the troops of a foreign prince to pass through his dominions . . .

"It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a Power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general licence to foreigners to enter the dominions of a friendly Power is never understood to extend to a military force; and an army marching into the dominions of another sovereign may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privileges by its irregular and improper conduct. It may, however, well be questioned whether any other than the sovereign power of the State be capable of deciding that such military commander is without a licence.

"But the rule which is applicable to armies does not appear

to be equally applicable to ships of war entering the ports of a friendly Power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without a special licence, into a friendly port. A different rule, therefore, with respect to this species of military force has been generally adopted. If, for reasons of State, the ports of a nation, generally, or any particular ports, be closed against vessels of war, generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all Powers with whom it is at peace, and they are supposed to enter such ports and to remain in them, while allowed to remain, under the protection of the Government of the place.

"In almost every instance the treaties between civilised nations contain a stipulation to this effect, in favour of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorise foreign vessels to enter his ports. The treaty bids him to allow vessels in distress to find refuge and asylum in his ports, and this is a licence which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a licence thus granted any immunity from local jurisdiction which would be implied in a special licence.

"If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly Powers, the conclusion seems irresistible that they enter by his assent. And if they enter by his assent, necessarily implied, no just reason is perceived by the Court for distinguishing their case from that of vessels which enter by express assent. In all the cases of exemption which have been reviewed much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

"These treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port, under the general licence which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade, who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly, with much plausibility, if not correctness, that the same rule and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special licence become subject to the local jurisdiction, it is demanded on what authority an exception is made in favour of ships of war?

"It is by no means conceded that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the Court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudiced.

"Without deciding how far such stipulations in favour of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted that the whole reasoning upon which such exemption has been implied in other cases applies with full force to the exemption of ships of war in this.

"Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction

of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege, to the extent in which it must have been understood to be asked. To the Court it appears that where, without treaty, the ports of a nation are open to the private and public ships of a friendly Power, whose subjects have also liberty, without special licence, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or trading vessels and those accorded to public armed ships which constitute a part of the military force of the nation. The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act.

"When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied licence, therefore, under which they enter, can never be construed to grant such exemption. But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of

the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied licence, therefore, under which such vessel enters a friendly port, may reasonably be construed and, it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality.

"Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly, in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception . . .

"It seems, then, to the Court, to be a principle of public law that national ships of war, entering the port of a friendly Power, open for their reception, are to be considered as exempted by the consent of that Power from its jurisdiction.

"Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him a right to claim that property in the Courts of the country in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case in which the sovereign power has implicitly consented to waive its jurisdiction.

"The arguments in favour of this opinion, which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to

avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points. . .

"If the preceding reasoning be correct, the *Exchange*, being a public armed ship, in the service of a foreign sovereign, with whom the Government of the United States is at peace, and having entered an American port, open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly Power, must be considered as having come into the American territory, under an implied promise that, while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country."

Note.—This celebrated judgment lays down the broad principles of immunity from territorial jurisdiction in all its phases. In the English case of *The Constitution* (1879, L.R. 4 P.D. 39), where a claim was brought against an American man-of-war, it was held that foreign public ships could not be sued in English Courts for salvage. The same principle was affirmed more recently in the case of *The Jassy* (75 L.J. P.D. 14).

THE PARLEMENT BELGE, 1878.

L.R. 5 P.D. 197.

The immunity from jurisdiction of a foreign Court applies to a public vessel of a State which carries mails and passengers and merchandise and is run for commercial purposes.

Case.—In this case proceedings *in rem* were instituted in the Admiralty Division on behalf of the owners of an English ship against the Belgian mail-packet, the *Parlement Belge*, to recover redress in respect of a collision. A writ was served in the prescribed manner on board the vessel, but no appearance was entered, and the Attorney-General, in answer to a motion for

judgment, filed an information of protest asserting that the Court had no jurisdiction to entertain the suit. The protest alleged that the *Parlement Belge* was a mail-packet running between Dover and Ostend, that she was and is the property of the King of the Belgians and in his possession, control, and employ as reigning sovereign of the State, and was and is a public vessel of the sovereign and State, carrying His Majesty's royal pennon, and was navigated and employed by and in the possession of such Government, and was officered by officers of the Royal Belgian navy, holding commissions, &c. In answer it was averred on affidavits, which were not contradicted, that the packet boat, besides carrying letters, carried merchandise and passengers and their luggage for hire. . . .

Judgment.—Brett, L.J., gave the judgment of the Court (James, Baggallay, and Brett, L.JJ.):

"The proposition raised by the first question seems to be as follows: Has the Admiralty Division jurisdiction in respect of a collision to proceed *in rem* against, and in case of non-appearance or omission to find bail, to seize and sell, a ship present in this country, which ship is at the time of the proceedings the property of a foreign sovereign, is in his possession, control, and employ as sovereign by means of his commissioned officers, and is a public vessel of his State, in the sense of its being used for purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war or employed as a part of the military force of his country? . . .

"It is admitted that neither the sovereign of Great Britain nor any friendly sovereign can be adversely personally impleaded in any Court of this country. It is admitted that no armed ship of war of the sovereign of Great Britain, or of a foreign sovereign, can be seized by any process whatever, exercised for any purpose by any Court of this country. But it is said that this vessel, though it is the property of a friendly sovereign in his public capacity and is used for purposes treated by him as public national services, can be seized and sold under the process of the

Admiralty Court of this country, because it will, if so seized and sold, be so treated, not in a suit brought against the sovereign personally, but in a suit *in rem* against the vessel itself. This contention raises two questions; first, supposing that an action *in rem* is an action against the property only, meaning thereby that it is not a legal proceeding at all against the owner of the property, yet can the property in question be subject to the jurisdiction of the Court?

"Secondly, is it true to say that an action *in rem* is only and solely a legal procedure against the property, or is it not rather a procedure indirectly, if not directly, impleading the owner of the property to answer to the judgment of the Court to the extent of his interest in the property? . . .

"Having carefully considered the case of the *Charkieh*,[1] we are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, viz., that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise by means of any of its Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

"But it is said that the immunity is lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use of her in part for trading purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers, and is substantially in use for national

[1] *See above*, p. 17.

purposes. Both these propositions raise the question of how the ship must be considered to have been employed.

"As to the first, the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the State. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of the *Exchange*. Whether the ship is a public ship used for national purposes seems to come within the same rule. But if such an inquiry could properly be instituted it seems clear that in the present case the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandise has been subordinated to the duty of carrying the mails. The ship is not, in fact, brought within the first proposition. As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the State which he represents. If the remedy sought by an action *in rem* against public property is, as we think it is, an indirect mode of exercising the authority of the Court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the State which is represented by such owner. The property cannot, upon the hypothesis, be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity."

Note.—The same principle has been applied in regard to State-owned railways. It was held in the American case of *Mason* v. *Intercolonial Railway of Canada* (197, Mass. R. 349) that an American Court could not attach money held by trustees in America to the credit of the railway company, because, as the railway was owned by the Canadian Government, the funds were therefore funds of the British sovereign.

It has recently been decided by the Prussian Court for the Determination of Conflicts of Jurisdiction that a German Court could not entertain a suit to enforce a judgment against the property of the Russian Government in Germany (*Von Hellenfeld* v. *Russian Government*; Anhalt Case). *Cf. American Journal of International Law*, April 1911, p. 490.

IV. Immunity of Ambassadors from Suit.

Cf. Oppenheim, ss. 389–396; Lawrence, 106; Hall, p. 171; Westlake, p. 203.

The privileges of ambassadors in England are guaranteed by a Statute which gives explicit sanction to international custom.

In 1708 in the reign of Queen Anne the Ambassador of the Czar Peter the Great was arrested and taken out of his coach in London for a debt which he had contracted there. He complained to the Queen, and the persons who were responsible for his arrest were imprisoned. But to satisfy the clamours of the foreign Ministers an Act of Parliament was passed which defines explicitly the privileges of ambassadors and their suites. This Act, it is said, is only declaratory of the common law of England, of which the law of nations must be deemed a part (*Novello* v. *Toogood*, 1 B. & C. 562; 25 R.R. 50). A similar statute was passed in 1790 in the United States. The English statute (7 Anne, ch. 12) runs as follows:

STATUTE AS TO IMMUNITIES OF AMBASSADORS.

"1. Whereas several turbulent and disorderly persons, having in a most outrageous manner insulted the person of his Excellency Andrew Artemonowitz Mattuof, Ambassador Extraordinary

of his Czarish Majesty, Emperor of Great Russia, Her Majesty's good friend and ally, by arresting him and taking him by violence out of his coach in the public street and detaining him in custody for several hours, in contempt of the protection granted by Her Majesty, contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other public ministers authorised and received as such have at all times been thereby possessed of, and ought to be kept sacred and inviolable, be it therefore declared by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in Parliament assembled and by the authority of the same, that all actions and suits, writs and processes commenced, sued or prosecuted against the said ambassador by any person or persons whatsoever, and all bail bonds given by the said ambassador, or any other person or persons on his behalf, and all recognisances of bail given or acknowledged in any such action or suit, and all proceedings upon or by pretext or colour of such action or suit, writ or process, and all judgments had thereupon, are utterly null and void, and shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.

"2. And be it enacted by the authority aforesaid that all entries, proceedings, and records against the said ambassador or his bail shall be vacated and cancelled.

"3. And to prevent the like insolences for the future, be it further declared by the authority aforesaid that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of an ambassador or other public minister of any foreign prince or State authorised and received as such by Her Majesty, her heirs, or successors, or the domestic, or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.

"4. And be it further enacted by the authority aforesaid,

that in case any person or persons shall presume to show forth or prosecute any such writ or process, such person and persons, and all attorneys and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process being thereof convicted by the confession of the party, or by the oath of one or more credible witness or witnesses before the Lord Chancellor or Lord Keeper of the Great Seal of Great Britain, the Chief Justice of the Court of Queen's Bench, the Chief Justice of the Court of Common Pleas for the time being, or any two of them, shall be deemed violators of the law of nations and disturbers of the public repose, and shall suffer such pains, penalties, and corporal punishment as the said Lord Chancellor, Lord Keeper, and the said Chief Justices, or any two of them, shall judge fit to be imposed and inflicted.

"5. Provided and be it declared that no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public Minister, shall have or take any manner of benefit by this Act, and that no persons shall be proceeded against as having arrested the servant of an ambassador or public minister by the virtue of this Act, unless the name of such servant be first registered in the office of one of the principal Secretaries of State, and by such secretary transmitted to the Sheriffs of London and Middlesex for the time being, or their under-sheriffs or deputies, who shall upon the receipt thereof hang up the same in some public place in their offices, whereto all persons may resort and take copies thereof without fee or reward.

"6. And be it further enacted by the authority aforesaid that this Act shall be taken and allowed in all Courts within this kingdom as a public Act, and that all judges and justices shall take notice of it without special pleading, and all sheriffs, bailiffs, and other officers and ministers of justice concerned in the execution of process are hereby required to have regard to this Act, as they will answer the contrary at their peril."

Extent of Ambassador's Immunity.

MAGDALENA STEAM NAVIGATION CO. v. MARTEN, 1859.

28 L.J. Q.B. 310; 2 Ellis and Ellis Reports, 94.

The public Minister of a foreign State cannot, while he remains such, be sued against his will in this country in a civil action, although the action may arise out of commercial transactions by business here, and although neither his person nor goods be touched by the suit.

Case.—In this case the liquidator of an English company made a call on the shares of the company held by the defendant, who was Envoy Extraordinary of the Republic of Guatemala at the British Court.

Judgment (Lord Campbell, C.J.).—"The question raised by this record is, whether the public Minister of a foreign State, accredited to and received by Her Majesty, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such public Minister may be sued, against his will, in the Courts of this country, for a debt, neither his person nor his goods being touched by the suit, while he remains such public Minister. The defendant is accredited to and received by Her Majesty as an Envoy Extraordinary and Minister Plenipotentiary for the republics of Guatemala and New Granada respectively; and a writ has been sued out against him and served upon him, to recover an alleged debt, for the purpose of prosecuting this action to judgment against him had whilst he continues such public Minister. He says, by his plea to the jurisdiction of the Court, that, by reason of his privilege as such public Minister, he ought not to be compelled to answer, We are of opinion that his plea is good, and that we are bound to give judgment in his favour. The great principle is to be found in Grotius de Jure Belli et Pacis, lib. 2, chap. xviii. sec. 9, 'Omnis

coactio abesse a legato debet.' He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the sovereign to whom he is accredited, and he has at least as great privileges from suits as the sovereign whom he represents. He is not supposed even to live within the territory of the sovereign to whom he is accredited, and if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country. For these reasons, the rule laid down by all jurists of authority who have written upon the subject is that an ambassador is exempt from the jurisdiction of the Courts of the country in which he resides as ambassador. Whatever exceptions there may be, they acknowledge and prove this rule. . . .

"Some inconveniences have been pointed out as arising from this doctrine, which, we think, need not be experienced. If the ambassador has contracted jointly with others, the objection that he is not joined as a defendant may be met by showing that he is not liable to be sued. As to the difficulty of removing an ambassador from a house of which he unlawfully keeps possession, De Wicquefort, and other writers of authority on this subject, point out that in such cases there may be a specific remedy by injunction. Those who cannot safely trust to the honour of an ambassador, in supplying him with what he wants, may refuse to deal with him without a surety, who may be sued; and the resource is always open of making a complaint to the Government by which the ambassador is accredited. Such inconveniences are trifling compared with those which might arise were it to be held that all public Ministers may be impleaded in our municipal Courts, and that judgment may be obtained against them in all actions, either *ex contractu* or *ex delicto*. It certainly has not hitherto been expressly decided that a public Minister duly accredited to the Queen by a foreign State is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles, and we give judgment for the defendant."

Note.—The immunity of an ambassador from process extends not

merely to the time during which he is accredited to the sovereign, but to such a reasonable period after he has presented his letters of recall as is necessary to enable him to wind up his official business. While the immunity exists, it is not competent for any person to sue out a writ against him (*Musurus Bey* v. *Gádban*, 1894, 2 Q.B. 352).

MACARTNEY v. GARBUTT, 1890.

L.R. 24, Q.B.D. 368.

A British subject, accredited to Great Britain by a foreign Government as a member of its embassy, unless he has been received by the British Government upon the express condition that he shall be subject thereto, is exempt from the local jurisdiction of his own country.

Case.—In this case the plaintiff sought to recover £118, which he had paid under protest to get rid of a distress upon the furniture in his house, levied by the defendants for parochial rates. The defendants contended that the distress was lawful, and that therefore the plaintiff was not entitled to recover. The plaintiff, Sir Halliday Macartney, who was an English subject, had been appointed by the Chinese Government English Secretary of the Chinese Embassy, and had been received in that capacity by the British Government. His name had been submitted to the Foreign Office in the usual way, and his position as a member of the Embassy recognised without reservation or condition of any sort.

Judgment.—In the course of his judgment for the plaintiff, Mathew, J., said :

" For the defendant it was conceded that the plaintiff, if he had been a foreigner, might be entitled to the exemption which he claimed ; but it was argued that, as a British subject, he remained liable to the laws of his own country ; and it was said that he was not within the description of persons exempt by the local Act, for the operation of the Act was limited by the words ' or any person not liable by law to pay such rate.'

"In support of this contention, reliance was placed on passages of chap. xi. of Bynkershoek's 'De Foro Legatorum,' which, it was said, showed that the Minister of a foreign State accredited to his own country remained subject to the laws of the State to which he owed allegiance. But the view of the learned author would seem to be that the envoy would be entitled to exemption from the local jurisdiction in all that related to his public functions, and this would seem to be the opinion of later writers on the subject (*see* Wheaton, International Law, 2nd ed., edited by Lawrence, p. 189, and the authorities there referred to). If this be the rule, the plaintiff would be protected from the seizure in question, which unquestionably interfered with the performance of his duty as a member of the embassy.

"But there is another principle which appears to afford the plaintiff the protection which he claims. Bynkershoek, in chap. viii., and all the later writers on the subject, recognise the right of the State to impose such conditions as are thought proper upon the reception of a member of a foreign embassy. But it is said, if the envoy be received without reservation, the condition is to be tacitly implied that he fully enjoys the *jus legationis*. Bynkershoek points out that the only mode of escaping from the doctrine of exemption is to impose on the envoy, when received, a condition that he shall be subject to the local jurisdiction. This principle is, as it would seem, with much good sense, extended by later writers to the case of the envoy accredited to his own Government. Thus Wheaton, International Law, p. 395, suggests that the privilege of the envoy to exemption from the civil jurisdiction of his own country is not lost where there has been no express condition to the contrary at the time when the member of the embassy is received by his own Government. In this case it appears from the correspondence which passed between the Home Office and the defendants that no such condition had been imposed upon the plaintiff. I am therefore of opinion that his goods were not liable to seizure, and that he is entitled to judgment for the amount claimed and costs."

V. Privileges of Consuls.

Cf. Oppenheim, ss. 434, 435; Lawrence, 131; Hall, p. 312; Westlake, p. 269.

VIVEASH v. BECKER, 1814.

3 Maude & Selwyn, 284; 15 R.R. 488.

A resident merchant of London, who is appointed and acts as consul to a foreign Prince, is not a "public Minister" of the foreign State exempt from process by the Act of 7 Anne, c. 12; nor is he, by the law of nations, entitled to the like privilege with an ambassador.

Case.—The question made was whether the defendant, who had been arrested for a debt of £548 at the suit of the plaintiffs, and compelled to give a bond, was entitled, as consul to the Duke of Sleswick Holstein Oldenburg, to privilege from arrest.

Judgment (Lord Ellenborough).—After considering the particular office of the defendant and the conditions of his appointment, the Court continued:

"The question is reduced to this, whether this defendant is entitled to the privilege of immunity from arrest, as belonging to him in his mere character of consul. Every person who is conversant with the history of this country is not ignorant of the occasion which led to the passing of the statute 7 Anne, ch. 12. An ambassador of the Czar Peter had been arrested, and had put in bail; and this matter was taken up with considerable inflammation and anger by several of the European Courts, and particularly by that potentate. In order to soothe the feelings of these powers the Act of Parliament was passed in which it was thought fit to declare the immunities and privileges of ambassadors and public Ministers from process; and it was enacted (sec. 4) 'that in case any person should presume to sue forth or prosecute any such writ, or process, such persons, &c., being thereof convicted should be deemed violators of the laws

of nations, and disturbers of the public repose, and should suffer such penalties and corporal punishment as the Lord Chancellor, Lord Keeper, or the Chief Justice of the Queen's Bench or Common Pleas, or any two of them, should judge fit to be inflicted.' Thus was conferred a great and extraordinary power, which I am happy to say in no other instance belongs to those persons, but the Act of Parliament was passed by way of apology, and in order to conciliate the Powers offended. It declares also that 'all writs and processes that shall in future be sued forth, whereby the person of any ambassador or other public Minister of any foreign prince or State may be arrested or imprisoned, &c., shall be deemed to be utterly null and void.' Here then the question is if this defendant be an ambassador or other public Minister of a foreign prince or State. He certainly is a person invested with some authority by a foreign prince, but is he a public Minister? There is, I believe, not a single writer on the law of nations, nor even of those who have written looser tracts on the same subject, who has pronounced that a consul is *eo nomine* a public Minister; and unless he be such he is not within the comprehension of the Act of Parliament. It has been very truly said that the Act is declaratory of the common law, and of the law of nations; and hence it has been argued that he may be entitled to this privilege by the law of nations, though he be not expressly designated in the Act. That may be so; although it is not very probable that when the Act of Parliament was passed for the purpose of laboriously and comprehensively exempting, as far as possible, all persons who stood in any relation to foreign States which would entitle them by the law of nations to be exempted, it should have omitted to designate any description of persons whom it meant to include. Therefore, upon the fair understanding of the statute, the question is whether he be a public Minister. If he be, he is protected by the Act, his arrest being in prejudice of the rights and privileges of public Ministers. But supposing the defendant to be one of those public functionaries who may be entitled to the privileges of the law of nations; how does the case stand upon the usage as it exists

under that law? In several books referred to in the course of the argument, and principally in Vattel, Book II., chap. ii. sec. 34, 'Of Consuls,' I find it laid down thus: '. . . Among the modern institutions for the utility of commerce one of the most useful is that of consuls, or persons residing in the large trading cities, and especially in foreign seaports, with a commission impowering them to attend to the rights and privileges of their nation, and to terminate misunderstandings and contests among its merchants. When a nation trades largely with a country, it is requisite to have there a person charged with such a commission, and as the State which allows of this commerce must naturally favour it, so for the same reason it is likewise to admit a consul. But there being no absolute and perfect obligation to this, the nation disposed to have a consul must procure itself this right by the very treaty of commerce.' He goes on: 'The consul is no public Minister, and cannot pretend to the privileges appertaining to such character. Yet bearing his sovereign's commission, and being in this quality received by the prince in whose dominions he resides, he is in a certain degree entitled to the protection of the law of nations.' No doubt he is entitled to the protection of the law of nations, and so is every man who comes into this country from a foreign State under a safe conduct. . . .

"And I cannot help thinking that the Act of Parliament which mentions only 'ambassadors and public Ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public Ministers entitled to these privileges, must be considered as declaratory not only of what the law of nations is, but of the extent to which that law is to be carried. It appears to me that a different construction would lead to enormous inconveniences, for there is a power of creating vice-consuls; and they too must have similar privileges. Thus a consul might appoint a vice-consul in every port to be armed with the same immunities, and be the means of creating an exemption from arrest indirectly which the Crown could not grant directly. The mischief of this would be enormous. . . .

" If we saw clearly that the law of nations was in favour of the privilege, it would be afforded to the defendant; and it would be our duty rather to extend than to narrow it. But we are of opinion that no such privilege exists, but that this defendant is, like every other merchant, liable to arrest."

Note.—A consul, though he has certain privileges, such as freedom from arrest for political causes and exemption from personal tax, does not enjoy the condition of ex-territoriality which is attached to an ambassador and his suite. He is liable to the ordinary civil jurisdiction of the country in which he resides, and in case of war he will be deemed to have enemy character if that country is England's enemy. *Cf. The Indian Chief* (*below* p. 179).

CHAPTER X.

NATIONALITY AND ALIENAGE.

(*a*) *Right of a State to refuse admission to Aliens.*

Cf. Oppenheim, s. 314; Hall, p. 56; Westlake, p. 288 ff.

MUSGROVE v. CHUN TEEONG TOY.

L.R. 1891, Appeal Cases 272; 60 L.J.P.C. 28.

An alien has not a legal right enforceable by action to enter British territory.

Case.—Appeal from a judgment of the Supreme Court of Victoria to the Privy Council.

The question in the appeal was whether the Colonial Government, as representing Her Majesty, had power to prevent the respondent, a Chinese immigrant, from landing on the shores of the colony. The Privy Council held that the Government had such power and that the rejected alien had no right to sue.

Judgment (Lord Herschell, L.C.).—After dealing with the Victorian statutes, the Court continued:

"Their Lordships have so far dealt with the case, having in view only the enactments of the legislature of Victoria, and it appears to them manifest that upon the true construction of these enactments no cause of action is disclosed on the record. This is sufficient to determine the appeal against the plaintiff, but their Lordships would observe that the facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action.

He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he was a native, but it is quite another thing to assert that an alien, excluded from any part of Her Majesty's dominions by the executive Government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal—whether the proper officer for giving or refusing access to the country has been duly authorised by his own Colonial Government, whether the Colonial Government has received sufficient delegated authority from the Crown to exercise the authority which the Crown had a right to exercise through the Colonial Government if properly communicated to it, and whether the Crown has the right without Parliamentary authority to exclude an alien. Their Lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their Lordships are of opinion that it would be impossible upon the facts which the demurrer admits for an alien to maintain an action."

Note.—The English Aliens Act, 1905 (5 Edw. VII. ch. 13), presupposes the right of the State to refuse admission to any aliens whom it regards as undesirable, and also the right of the State to expel any aliens from its territory after admission. The American Courts have given a decision to the same effect as that of the English Privy Council; *Fong Yue Ting* v. *United States*, 1892 (149 U.S. 698).

(*b*) *The Right of Expatriation.*

Cf. Oppenheim, s. 306; Lawrence, 96; Hall, p. 229; Westlake, p. 225.

REX v. LYNCH.

L.R. 1903, 1 K.B. 444; 72 L.J. K.B. 167.

The Naturalisation Act, 1870, does not empower a British subject to become naturalised in an enemy State in time of war; and the act of becoming naturalised under such circumstances is itself an act of treason, and ineffectual to afford protection against an indictment for treason in subsequently joining the military forces of the enemy.

Case.—This was a trial at bar for high treason of an Irishman born in Australia, who during the war between Great Britain and the late South African Republic became a burgher of the Republic and took up arms against the British force. For the defence reliance was placed on the Naturalisation Act. One of the overt acts of treason charged was the taking of an oath of allegiance to the enemy during the war.

Judgment (Lord Alverstone, L.C.J.).—"The indictment charges the prisoner in two counts with adhering to the Government of the South African Republic, and in the others with adhering to the Government of the Orange Free State, and it alleges altogether some fifteen overt acts; but for the purposes of the argument that has been addressed to us it is important to draw a distinction between the two first overt acts and the subsequent overt acts. The two first acts, the declaration of willingness to take up arms and the taking of oath of allegiance to the South African Republic, although they took place on the same day as the grant of letters of naturalisation, in fact preceded it. The other overt acts were all deliberate acts of warfare or in aid of warfare against the forces of the Crown, and took place subsequently to the grant of naturalisation. It is not disputed on behalf

of the prisoner that, apart from the Naturalisation Act, 1870, the alleged naturalisation in the enemy State would afford no defence. But reliance is placed on sec. 6, which provides that any 'British subject who has at any time before or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalised in such State, shall from and after the time of his so having become naturalised in such foreign State, be deemed to have ceased to be a British subject, and be regarded as an alien.' It is contended that this provision entitles a British subject to become an alien and throw off his allegiance to the Crown, even in time of war. Even if that were so, it would afford no defence in respect to the two first overt acts, for by sec. 15, 'where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien.'

"But, further, I am clearly of opinion that sec. 6 does not empower a British subject to become naturalised in an enemy country during time of war, and that consequently the question of the prisoner's liability with respect to the subsequent overt acts must also be left to the jury. In my opinion there is nothing in the Act of 1870 to justify the contention that an act of treason can give any rights to any person whatever.

"Whatever a declaration of war may or may not do, it at any rate prevents British subjects from making arrangements with the King's enemies, when such arrangements would constitute crimes against the law of the country to which they owe allegiance."

Note.—Although the rule of indefeasible allegiance is abrogated by the Naturalisation Act, it is still not open to a British-born subject, by professing to be naturalised in the country of the King's enemies after the outbreak of war, to justify his action, and divest himself of his original allegiance, though, *semble*, if he were naturalised before hostilities were threatened, he would commit no offence.

(c) *Resident Alien's Duty of Allegiance.*

Cf. Oppenheim, ii. s. 100.

DE JAGER v. ATTORNEY-GENERAL OF NATAL.

76 L.J. P.C. 62; [1907] A.C. 326.

A resident alien within British territory owes allegiance to the Crown, and if he assists invaders during the absence of the British forces he is rightly convicted of high treason.

Case.—The petitioner had been adjudged guilty of high treason and was sentenced to five years' imprisonment and to pay a fine of £5000; he was a burgher of the late South African Republic, who for ten years and at the date of the outbreak of war in 1899 was peacefully residing in Waschbank, in Natal, and continued to do so after the battle of Elandslaagte on October 21 of that year while the Boer forces occupied that part of Natal in which Waschbank is situated and the British forces had retired to Ladysmith. The Boers administered the government and remained in occupation till March 1900. The petitioner alleged that he was thereupon compellable to join, and did join, the Boer forces, and aided and assisted them both as commandant and as a commissioner and justice of the peace; but that he had thereby committed no offence, because the British Government had withdrawn its protection, and he owed it therefore no duty.

The Privy Council dismissed the petition. The judgment of their Lordships was delivered by Lord Loreburn, L.C.:

Judgment.—"The petitioner, Lodewyk Johannes De Jager, was adjudged guilty of high treason by the special Court constituted by Act No. XIV. of 1900 of the Colony of Natal, and now seeks special leave to appeal to His Majesty in Council from that judgment and the sentence which followed.

"It is an old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though not a subject. Some authorities affirm that this duty and liability arise from the fact that while in British territory he receives the King's protection. Hence Sir R. Finlay argued that when the protection ceased its counterpart ceased also, and that as the British forces evacuated Waschbank on October 21, 1899, the petitioner was lawfully entitled to assist the invaders on and after October 24 without incurring the penalty of high treason.

"Their Lordships are of opinion that there is no ground for this contention. The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful sovereign, wrongs done during the foreign occupation are cognisable by the ordinary Courts. The protection of the sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled. Their Lordships consider that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the sovereign who extended it. In modern times great numbers of aliens reside in this and in most other countries, and in modern usage it is regarded as a hardship if they are compelled to quit, as they rarely are, even in the event of war between their own sovereign and the country where they so reside. It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms for the invaders. A small invading force might thus be swollen into a considerable army, while the risks of transport (which in the case of oversea expedi-

ditions are the main risks of invasion) would be entirely evaded by those who, instead of embarking from their own country, awaited the expedition under the protection of the country against whom it was directed. These considerations would not justify a British Court in deciding any case contrary to the law, but they offer an illustration of consequences which would follow if the law were as the petitioner maintains. There is no authority which compels their Lordships to arrive at so strange a conclusion."

CHAPTER XI.

EFFECT OF TREATIES.

Oppenheim, s. 520.

WALKER v. BAIRD.

1892, A.C. 691 ; 61 L.J. P.C. 92.

Acts done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into between the Crown and foreign Powers, which affect the private rights of British subjects, are not acts of State and their legality will be considered by the Courts.

Case.—This was an action of trespass brought by a British subject of Newfoundland against the commander of H.M.S. *Euryale* for entering and taking possession of his lobster factories on the coast of Newfoundland. The defendant alleged that he had acted under the orders of the Crown for the purpose of enforcing a *modus vivendi* which had been concluded with the French Government, for regulating the conduct of the lobster fisheries, and that his actions were acts of State and matters which could not be inquired into by the Courts.

Judgment.—Lord Herschell (giving the judgment of the Privy Council dismissing the defendant's appeal against an order declaring that his defence disclosed no answer to the action) said :

" In their Lordships' opinion this judgment was clearly right, unless the defendant's acts can be justified on the ground that they were done by the authority of the Crown for the purpose

of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign Power. The suggestion that they can be justified as acts of State, or that the Court was not competent to inquire into a matter involving the construction of treaties and other acts of State, is wholly untenable.

"The learned Attorney-General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty. The proposition he contended for was a more limited one. The power of making treaties of peace is, as he truly said, vested by our Constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace; that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace, and whether, if so, it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorised otherwise than by the legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion. Their Lordships agree with the Court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition for which alone the appellant's counsel contended."

Note.—It has been seen above (p. 34 ff.) that the actions of the executive officers of the Crown in countries acquired by conquest and cession are regarded as Acts of State, and though they affect private rights, cannot be questioned by the Courts. But a treaty by English municipal law does not become part of the law of the land, and if it is designed to alter

private rights, it must either be embodied in an Act of Parliament, or a special Act must be passed to give effect to its provisions, so as to make them binding on the subject.

FOSTER v. NEILSON, 1829.

United States Supreme Court.

2 Peters, 253, at p. 314.

Extract from judgment of Marshall, C.J. :

"A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

"In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in Courts of justice as equivalent to an Act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."

Note.—This statement of the great American judge marks the difference between the attitude of the American and the English practice towards treaties. In the United States a treaty becomes immediately part of the law of the land, by an article of the Constitution. Treaties, however, may be superseded in American Courts by subsequent Acts of Congress conflicting with them (*Head Money Cases*, 112 U.S. 580). Thus before the American Courts an Act of Congress imposing special tolls on non-American vessels using the Panama Canal would supersede the provisions of the Hay-Pauncefote Treaty, which provides for equal treatment for all vessels.

Effect of War on Treaties.

Cf. Oppenheim, vol. ii. s. 99; Hall, pp. 360, 379; Westlake, p. 284.

SUTTON v. SUTTON, 1830.

1 Russell and Mylne, 663.

Political and other treaties which have been concluded for the purpose of setting up a permanent condition of things are not ipso facto annulled by the outbreak of war.

Case.—The question raised was whether the provisions in the treaty of peace between England and the United States made in 1794 were annulled by the outbreak of war between these two countries in 1813, so as to deprive British subjects in America of their title to lands accorded by the treaty. The treaty provided that the subjects of each of the two countries could hold land in the territory of the other, although they were aliens.

Judgment.—The Master of the Rolls (Sir John Leach): ... "The relations which had subsisted between Great Britain and America when they formed one empire led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and the privileges of natives being reciprocally given not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

"The Act of 37 George III. gives full effect to this article of the treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article that it was to

be permanent and independent of a state of peace or war, then the Act of Parliament must be held, in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the Act is to continue in force so long only as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the Act only as would in their nature depend upon a state of peace.

"I am of opinion, therefore, in favour of the title, and consider that the heirs and assigns of every American who held lands in Great Britain at the time mentioned in the Act of the 37 George III. are, as far as regards those lands, to be treated, not as aliens, but as native subjects."

SOCIETY FOR THE PROPAGATION OF THE GOSPEL v. TOWN OF NEWHAVEN.

Supreme Court of United States, 1823 (8 Wheaton, 464).

Case.—The question was whether the plaintiffs, an English corporation, were entitled to hold land in an American State. It was urged that by the War of Independence they had become a foreign corporation which could not hold land; and the war of 1814 had destroyed the effect of the treaty of peace made at the end of the War of Independence which afforded special protection to English corporations.

Judgment.—". . . But we are not inclined to admit the doctrine urged at the Bar, that treaties become extinguished, *ipso facto*, by war between the two Governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put

an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted and would be so monstrous as to supersede all reasoning.

"We think, therefore, that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are at most only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."

Note.—These two decisions, one of an English and the other of an American tribunal, show that war does not put an end to the effect of all treaties between the belligerent countries, though it may suspend their operation during the hostilities. It depends on the character of the particular provisions whether the treaty or any part of it is to be regarded as abrogated *ipso facto* by the war.

PART II.

CHAPTER XII.

THE LAW OF WAR.

RIGHTS OF BELLIGERENTS.

Hostile Embargo.

Cf. Oppenheim, vol. ii. s. 40; Lawrence, 137; Hall, p. 362; Westlake, vol. ii. p. 10.

THE "BOEDUS LUST," 1803.

5 C. Robinson, 245.

A State in expectation of war with another State may detain the merchant vessels of that State which are lying in its ports: and if war breaks out those vessels may be confiscated.

Case.—This was the case of a Dutch ship on a voyage from Demerara to Batavia, embargoed at the Cape of Good Hope by an English squadron before the actual declaration of war against Holland in 1803, and afterwards condemned as enemy's property.

Judgment (Sir W. Scott, J.).—Extract: "This was the state of the first seizure. It was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo. That would have been the retro-active effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retro-active effect is directly the other way. It impresses the direct

hostile character upon the original seizure. It is declared to be no embargo, it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was done *hostili animo* and is to be considered as a hostile measure *ab initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set up on either side, and the State, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly the general mass of Dutch property has been condemned on this retro-active effect; and this property stands upon the same footing."

Note.—One of the Hague Conventions of 1907 (No. 6) provides that it is desirable that merchant vessels found in a belligerent port at the beginning of war should be allowed to depart freely immediately or after a time of grace, and in any case they may not be confiscated but only detained, under the obligation that they must be restored without indemnity at the end of the war. But the bare right of embargo, though seldom practised of recent years, still remains. In the case of the *Johanna Emilie*, 1854 (Spinks, 14), Dr. Lushington said: "With regard to an enemy's property coming to any part of the kingdom, *or being found there*, being seizable, I confess I am astonished that doubt should exist on the subject. I apprehend the law has been this, that it is competent for any persons to take possession of such property, unless it had any protection by licence, or by some declaration emanating by the authority of the Crown, and to assist the Crown to proceed against it to adjudication." The modern practice of so-called pacific blockade partakes of the nature of embargo, being practised before war has definitely broken out between two States.

Prize Courts.

Cf. Oppenheim, ii. s. 192; Westlake, ii. p. 288 ff.

THE "MARIA" (No. 1), 1799.

1 C. Rob. 340.

The law administered by a national Prize Court should be international.

Case.—Sir W. Scott, in asserting the right of a belligerent English cruiser to search a Swedish neutral vessel, though under the convoy of a Swedish man-of-war, laid down broadly the function of a Prize Court:

"In forming that judgment, I trust it has not escaped my anxious recollection what it is that the duty of my station calls for from me—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes and particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent States, some happening to be neutral and some belligerent. The seat of judicial authority is locally here in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine the question exactly as he would determine the same question if he were sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law on this matter, I administer that which I consider, and which I mean should be considered, as the universal law upon the question."

Note.—Lord Stowell developed this conception of international prize-law as a universal law in a case where he had to determine whether a belligerent could set up a Prize Court in neutral territory (*The Flad*

Oyen, 1 C. Rob. 135). A French privateer had carried an English prize vessel into Bergen, and there procured its condemnation by the French Consul. In repudiating the condemnation he declares: "It is my duty not to admit that because one nation has thought proper to depart from the common usage of the world and to treat the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance independent of all practice from the earliest history of mankind. The institution must conform to the text law and likewise to the constant usage of the matter."

Modern authorities on international law, however, emphasize the fact that Prize Courts are national and the law they administer municipal law (*cf.* Westlake and Oppenheim, N.S.), and for this reason they desire the establishment of an International Prize Court.

Visit and Search.

Cf. Oppenheim, ss. 414–421; Lawrence, 241–245; Hall, p. 723 ff.

THE "MARIA," 1799.

A belligerent cruiser has the right of visiting and searching all merchant ships on the high seas.

Case.—This was the same case as the last, in which one of a fleet of Swedish merchantmen, carrying pitch, tar, hemp, and iron to several ports of France and the Mediterranean, was taken, while sailing under convoy of a ship of war, and proceeded against for resistance of visitation and search by British cruisers.

Judgment.—Sir W. Scott, after expounding the general nature of prize law (*see above, p.* 153), laid down the following broad propositions upon the right of search.

"(1) That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are;

and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant with subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature is in the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly coexist.

"(2) That the authority of the sovereign of the neutral country being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully commissioned belligerent cruiser; I say *legally*, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter

which, sitting in this Court, I have no right to entertain. All that I assert is that *legally* it cannot be maintained that if a Swedish commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorised by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit (as in some late instances they have agreed), by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorised speculations it is not necessary for me to descant: the law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent) give them no sort of countenance; and until that law and practice are new-modelled in such a *way* as may surrender the known and ancient rights of some nations to the present convenience of other nations (which nations may perhaps REMEMBER to *forget* them, when they happen to be themselves belligerent), no reverence

is due to them; they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war—that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilised States, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expense of the constant hazard of the harmony of States, and of the lives and safeties of innocent individuals.

"(3) That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law."

Note.—The Declaration of London now provides that neutral merchantmen under the convoy of a warship of this country are normally free from the belligerent's right of search. But the general principles laid down in this judgment as to the belligerent's rights are still valid.

Destruction of Prizes.

Cf. Oppenheim, s. 431; Lawrence, 191; Hall, p. 452; Westlake, vol. ii. p. 318.

THE "LEUCADE," 1855.

Spink's Prize Cases, p. 217.

A neutral whose vessel has been destroyed before being brought into a Prize Court is entitled to restitution.

Case.—In this case an Ionian vessel had been seized by an English captor on the ground of illegal trade with Russia. It

was held, however, that the trade was legal and the vessel was released, and the owners made a claim for restitution and costs. Dr. Lushington, in giving judgment, dealt with the whole question of restitution by Prize Courts, and especially with the question of destruction of prizes.

Judgment.—"We must bear in mind the wide difference between the detention of a vessel under the colours of the enemy or under neutral flags. The destruction of a vessel under hostile colours is a matter of duty; the Court may condemn on proof which would be inadmissible or wholly irregular in the instance of a neutral vessel. Indeed the bringing to adjudication at all of an enemy's vessel is not called for by any respect to the right of the enemy proprietor when there is no neutral property on board. But for totally different considerations, when a vessel under neutral colours is detained, it has the right to be brought to adjudication, according to the regular course of proceeding in the Prize Court, and it is the very first duty of the captor to bring it in, if it be practicable.

"From the performance of the duty the captor can be exonerated only by showing that he was a *bona fide* possessor and that it was impossible for him to discharge it. No excuse for him as to inconvenience or difficulty can be admitted as between captor and claimants. If the ship be lost, that fact alone is no answer; a captor must show a valid cause for the detention as well as the loss. If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore, is that if a ship under neutral colours be not brought to a competent Court for adjudication, the claimants are as against the captor entitled to costs and damages. Indeed if the captor doubt his power to bring in a vessel to adjudication, it is his duty under ordinary circumstances to release her."

Note.—The Declaration of London contains a section (Articles 48–54) dealing with the destruction of neutral prizes; and the rule there adopted is that, while destruction is permitted in exceptional cases to a captor when the neutral vessel would have been liable to con-

demnation in a prize Court, unless the captor subsequently proves that he acted under an urgent necessity and in a case where the capture was valid, he must pay full compensation to the parties interested. But an enemy prize may be destroyed by the captor.

Prizes Captured in Neutral Waters.

Cf. Oppenheim, vol. ii. s. 49 ; Hall, p. 617 ff. ; Westlake, p. 202.

THE "ANNE," 1818.

Supreme Court of the United States (3 Wheaton, 435).

A capture made in neutral waters is, as between enemies, deemed to all intents and purposes a legal capture. The neutral sovereign can alone call its validity in question.

If the captured enemy ship commences hostilities in neutral waters, she thereby forfeits neutral protection.

Case.—This was the case of a British ship captured, during the war between England and the United States, while lying at anchor near the Spanish part of the island of St. Domingo by the American privateer *Ultor.*

Judgment (Story, J.).—". . . The claim of the Spanish Government for the violation of its neutral territory being thus disposed of, it is next to be considered whether the British claimant can assert any title founded upon that circumstance.

" By the return of peace, the claimant became rehabilitated with the capacity to sustain a suit in the Courts of this country ; and the argument is that a capture made in a neutral territory is void ; and therefore, the title by capture being invalid, the British owner has a right to restitution. The difficulty of this argument rests in the incorrectness of the premises. A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful ; it is only by the neutral sovereign that its legal validity can be called in question ; and as to him and him only is it to be considered void. The enemy has no rights whatsoever, and if the neutral sovereign omits or

declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well-established principles of public law.

"There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self-defence. The privateer had an equal title with herself to the neutral protection, and was in no default in approaching the coast without showing her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities for any purpose in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.

"The conclusion from all these views of the case is, that the ship and cargo ought to be condemned as good prize of war."

Note.—If, however, the prize captured in neutral waters comes within the territorial jurisdiction of the neutral State, it is the duty of that State to secure its restoration (*Hudson* v. *Guestier*, 6 Cranch, 284).

For an English case which deals with the effect of capture in neutral waters *see The Anna* (*above*, p. 52).

CHAPTER XIII.

NON-INTERCOURSE WITH THE ENEMY.

Cf. Oppenheim, ii. ss. 100, 101; Lawrence, 143; Hall, p. 550; Westlake, vol. ii. p. 44.

THE "HOOP," 1799.

1 C. Robinson, 196.

British merchants are not at liberty to trade with the enemy without the King's licence; all property taken in such trade is confiscable as prize to the captor.

Case.—This was the case of a ship laden with flax, madder, and cheese, and bound from Rotterdam ostensibly to Bergen; she was in truth coming to a British port, and took a destination to Bergen to deceive the French cruisers. She was seized by a British vessel and brought in as a prize on the ground that she was engaged in trade between enemy subjects. The goods were to be imported on account of British merchants, being most of them articles of considerable use in the manufactures and commerce of this country, and being brought under an assurance from the commissioners of customs in Scotland that they might be lawfully imported without any licence, by virtue of the statute 35 Geo. III. c. 15, sec. 180, passed during the war.

Judgment (Sir W. Scott).—". . . It is said that these circumstances compose a case entitled to great indulgence; and I do not deny it. But if there is a rule of law on the subject binding the Court, I must follow where that rule leads me; though it

leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

" In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as a universal principle of law: ' Ex natura belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis decarant,' &c. He proceeds to observe that the interests of trade and the necessity of obtaining certain commodities have sometimes so far overpowered this rule that different species of traffic have been permitted, *prout e re sua, subditorumque suorum esse censent principes* (Bynk., Q.J.P.B. 1, c. 3). But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quo ad hoc*. It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principes*. It appears from these passages to have been the law of Holland; Valin, l. iii., tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels; it will appear in a case which I shall have occasion to mention, *The Fortuna*, to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe.

" By the law and Constitution of this country, the sovereign alone has the power of declaring war and peace. He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable

with the general interest of the State. It is for the State alone, on more enlarged views of policy, and of all circumstances which may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be insensible to the consequences that might follow, if every person in a time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the Government, charged with the care of the public safety?

"Another principle of law, of a less public nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with grear rigour. The same principle is received in our Courts of the law of nations; they are so far British Courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy—such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hâc vice*. But otherwise he is totally *ex lex*; even in the case of ransoms which are contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the

payment was enforced by an action brought by the imprisoned hostage in the Courts of his own country, for the recovery of his freedom. A State in which contracts cannot be enforced cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a Court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter vii., where he lays down that the legality of commerce and the mutual use of Courts of Justice are inseparable; he says that cases of commerce are undistinguishable from cases of any other species in this respect: 'Si hosti semel permittas actiones exercere, difficile est distinguere ex quâ causâ oriuntur, nec potui animadvertere illam distinctionem usu fuisse servatam.'

"Upon these and similar grounds it has been the established rule of law of this Court, confirmed by the judgment of the Supreme Court, that a trading with the enemy, except under a royal licence, subjects the property to confiscation; and the most eminent persons of the law sitting in the Supreme Court have uniformly sustained such judgments. . . .

"I omit many other cases of the last and the present war merely on this ground, that the rule is so firmly established that no one case exists which has been permitted to contravene it—for I take upon me to aver that all cases of this kind which have come before that tribunal have received a uniform determination. The cases which I have produced prove that the rule has been rigidly enforced: where Acts of Parliament have on different occasions been made to relax the navigation law and other revenue Acts; where the Government has authorised, under the sanction of an Act of Parliament, a homeward trade from the enemy's possession, but has not especially protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has

been enforced where strong claim, not merely of convenience, but almost of necessity, excused it, on behalf of the individual; that it has been enforced where carriages have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the Crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied States in war had a right to notice and apply, mutually, to each other's subjects. Indeed it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield, as I understand him, that such is the maritime law of England." (*Gist* v. *Mason*, 1 T.R. 85.)

Note.—Although the general rule is that trading with enemy subjects is prohibited, the belligerent State may grant either a licence to any subjects allowing them to trade generally or in some particular commodity with the enemy country, or a licence to any of the enemy subjects exempting them from the ordinary effects of war. It has been generally thought on the Continent that Article 23 (*h*) of the Hague Regulations concerning land warfare abolishes the old rule by which enemy subjects cannot sue in the Courts during war; but this interpretation has not been accepted in England.

In the only prize-case decided during the South African War *The Mashona*, the Supreme Court in the Cape, condemned the British ship and the cargo of English merchants destined for the Transvaal, including goods consigned to domiciled neutrals, on the ground that it was an infringement of the law of non-intercourse. De Villiers, C.J., in his judgment, said: "The law is clear that one of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the subjects of the States at war without the licence of their respective governments. . . . The prohibition applies to all persons domiciled within the hostile State. If a war breaks out, a foreign merchant, carrying on trade in a belligerent country, has a reasonable time allowed him for transferring himself and property to another country. If he does not avail himself of the opportunity he is treated, for the purpose of the trade, as the subject of the Power under whose dominion he carries it on and as an enemy by those with whom that Power is at war."

(Reported in *Journal of Society of Comparative Legislation*, N.S., vol. ii, 1900, pp. 326–7.)

NEW YORK LIFE INSURANCE CO. v. STATHEM, 1876.

United States Supreme Court (93 U.S. 24).

Executory contracts between subjects of belligerent States where time is of the essence of the contract are annulled by war. Life insurance policies are of this character, but the assured is entitled to recover the equitable value of the policy at the time of the outbreak of the war.

Case.—This was a suit to recover the amount of a policy of life assurance granted by the appellant company in 1851 on the life of Dr. Stathem. The annual premiums accruing on the policy were regularly paid till the breaking out of the Civil War between the Federal Government and the Confederates; but in consequence of that event the premium due on December 1861 was not paid, the party assured being resident in Mississippi, while the appellant was a corporation of New York. Dr. Stathem died in 1862 before the war was over.

The policy contained various conditions, upon the breach of which it was to be null and void; and amongst others the following: "That in case the said (assured) shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine."

Judgment.—Mr. Justice Bradley, after stating the case, delivered the opinion of the Court:

"We agree with the Court below that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums.

Such is the form of the contract, and such is its character. . . Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing where the annual premiums are spread over the whole life. . . . The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

"But the Court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended.

"Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the Civil War, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition?

"The truth is that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

"In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival.

"It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large

number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk.

"The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

"We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

"The question then arises: Must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that on the failure to pay any of the instalments when due the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided.

"But it was caused by an event beyond the control of either party—an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex æquo et bono*, be returned to him. This would clearly be demanded by justice and right.

"And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy. . . .

"We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

"Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war. . . ."

Clifford, J. (with whom concurred Hunt, J.), dissented and said:

"Where the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract

between such parties is suspended during the existence of the war, and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract."

Note.—In general all executory contracts entered into with alien enemies before the war are avoided by the war, *Esposito* v. *Bowden*, 1857 (7 E. & B. 763). But the practice of the United States Courts during the Civil War was to extend indulgence to those persons in the Confederate States who had entered into contracts with persons or corporations in the Federal States before the outbreak of war. Owing to the international character of the modern credit system the more liberal practice is likely to be followed in future.

JANSON v. DRIEFONTEIN CONSOLIDATED MINES, LTD.

Law Reports, 1902; A.C. 484; 71 L.J. K.B. 857.

Where a subject of a foreign Government insures treasure with British underwriters against capture during its transit from the foreign State to this country, and the foreign Government seizes the treasure during the transit, and war is afterwards declared between the foreign and the British Governments, the insurance is valid, and an action may be maintained in this country against the underwriters after the restoration of peace, though the seizure is made in contemplation of war, and in order to use the treasure in support of the war.

Case.—The respondents, a company registered under the law of the South African Republic, in August 1899, insured with the appellant and other underwriters gold against (*inter alia*) "arrests, restraints, and detainments of all kings, princes, and people," during its transit from the Gold Mines near Johannesburg in the Transvaal to the United Kingdom. On October 2, 1899, the gold was during its transit seized on the frontier by order of the Government of the South African Republic. On

October 11 at 5 P.M. a state of war began between the British Government and the Government of the Republic. At the time of the seizure war was admitted to be imminent, and the appellant urged that the policy was voided.

The respondent company had a London office, but its head office was at Johannesburg. Most of its shareholders were resident outside the Republic and were not subjects thereof.

Judgment.—Lord Halsbury (L.C.) in dismissing the appeal said: ". . . Trading with the King's enemies is, of course, illegal. Undertaking by contract to indemnify the King's enemies against loss inflicted by the King's forces is also illegal. Such things are manifestly unlawful; but the words 'King's enemies' are a necessary feature of the last proposition. Substituting the word 'aliens,' who may possibly or even probably become the King's enemies—and in this case the loss and the policy were both before there were any persons who could answer to that description—it would be, to my mind, to introduce a new principle into our law to hold that the probability of a war should have the same operation as war itself. It is war and war alone that makes trading illegal. . . . I only desire to add that the authorities referred to in the argument do not justify the proposition that expected wars render a contract illegal between citizens of the two nations between whom war is anticipated; and to lay down such a rule would be to establish an entirely new case for which there is no authority in the law."

Lord Macnaghten said: "I think the learned counsel for the respondent was right in saying that the law recognises a state of peace and a state of war but that it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war. In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war. It is not, I think, for private individuals to pronounce upon the foreign relations of their sovereign or their country and to measure their own responsibilities arising out of civil contracts with foreigners by a standard

of public policy which they set up for themselves, even though their views may be right in the abstract and might possibly find acceptance with a jury of their countrymen if such a question were within the competence of such a tribunal. Public policy, in my opinion, requires a good citizen in matters of this sort to conform to the rule and guidance of the State. However critical may be the condition of affairs, however imminent war may be, if and so long as the Government of the State abstains from declaring or making war or accepting a hostile challenge there is peace—peace with all attendant consequences—for all its subjects.

"The result, therefore, in the present case is that, however hostile the intentions of the South African Republic may have been at the moment when this gold was seized, the seizure must be treated as a seizure in time of peace between the Republic and this country."

Lord Davey in the same case said:

"My Lords, there are three rules which are established in our common law. The first is that the King's subjects cannot trade with an alien enemy, *i.e.* a person owing allegiance to a Government at war with the King, without the King's licence. . . . Every contract made in violation of this principle is void, and goods which are the subject of such a contract are liable to confiscation. The second principle is a corollary from the first, but is also rested on distinct grounds of public policy. It is that no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government. One of the most effectual instruments of war is the crippling of the enemy's commerce, and to permit such an insurance would be to relieve enemies from the loss they incur by the action of British arms, and would, therefore, be detrimental to the interests of the insurer's own country. The principle equally applies where the insurance is made previously to the commencement of hostilities, and was, therefore, legal in its inception, and whether the person claiming on the policy be a neutral or even a British subject if the insurance be effected on behalf of an

alien enemy. The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace."

Finally, Lord Lindley's remarks may be quoted:

"War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading: *see Esposito* v. *Bowden*, 7 E. & B. 781. But threatened war or anticipated war or imminent war is peace, which may not after all result in war; and to apply the rules of war to insurances against loss before war breaks out would paralyse commerce, and often without any real necessity. Is it for the interest of this country to dislocate trade because international relations are strained and war appears probable to the public, who do not know and cannot know the real views and resolutions of the Governments concerned? It must be remembered that contracts of insurance are not by any means the only contracts which have to be considered in this connection: what affects them affects contracts of sale and contracts of carriage both by land and sea, and in fact affects the whole external commerce of this country.

"My Lords, where a policy of insurance is not void *ab initio*, and a loss from one of the perils insured against happens before war is declared or breaks out, what defence can be offered to an action upon it? I know of none except where the loss is occasioned by British capture followed by war. Of course, if war breaks out before the action is brought or before it is over, the war suspends its prosecution, for an alien enemy cannot sue in this country: *Le Bret* v. *Papillon* (1804), 4 East 502. Your Lordships are asked to invent a new defence unheard of before, and to say that every policy on a foreigner's property abroad is subject to the implied condition that it shall not be seized by his own Government in order to be used against this country if war breaks out. Such a doctrine, I venture to think, would

paralyse legitimate trade and be entirely against the interests of this country."

Note.—This case illustrates the tendency of the Courts to-day to interpret the rule against trading with enemy subjects as narrowly as possible so as to uphold the validity of contracts which may have been made in contemplation of war with this country but of which the effect was completed before war actually broke out. This case is also notable for the fact that the respondents, though an alien enemy corporation, were allowed to sue while hostilities were proceeding. If the parties are desirous of obtaining a decision on the merits of the case the rule against enemy subjects sueing and being sued may be waived. An alien enemy may, according to English law, be sued in our Courts during the hostilities, though he cannot normally sue (*Albrecht* v. *Sussman*, 2 V. and B. 324).

CHAPTER XIV.

ENEMY CHARACTER.

Cf. Oppenheim, vol. ii. ss. 87–92; Lawrence, 147–159; Hall, p. 490 ff.; Westlake, vol. ii. pp. 140–151.

THE "INDIAN CHIEF," 1801.

3 C. Robinson, 12.

(1) A neutral merchant residing in a belligerent country is to be regarded as a belligerent trader; but the moment he puts himseld in motion bona fide to return to his native country sine animo revertendi, he loses his belligerent character and resumes that of a neutral.

(2) A neutral merchant living under British protection in the Orient is accounted as having a British domicile for war purposes.

Case.—This was the case of a ship and cargo seized in the harbour of Cowes, on a voyage from Batavia to Hamburg, in which two questions arose, respecting the national character of the owners of the ship and cargo respectively, both American citizens residing in British territory, and charged with trading with the enemy.

Judgment (Sir W. Scott).—"This is the case of a ship seized in the port of Cowes, where she came to receive orders respecting the delivery of a cargo taken in at Batavia, with a professed original intention of proceeding to Hamburg; but on coming into this country for particular orders, the ship and cargo were seized in port. It does not appear clear to the Court that it

might not be a cargo intended to be delivered in this country, as many such cargoes have been, under the Dutch property Act: I mention this to meet an observation that has been thrown out, 'that it is doubtful whether the ship might not be confiscable on the ground of being a neutral ship coming from a colony of the enemy, not to her own ports or the ports of this country.' I assume it as a demonstrated fact in the case that the cargo was to be delivered at Hamburg. The vessel sailed in 1795, and as an American ship with an American pass, and all American documents; but nevertheless if the owner really resided here, such papers could not protect his vessel; if the owner was resident in England, and the voyage such as an English merchant could not engage in, an American residing here, and carrying on trade, could not protect his ship merely by putting American documents on board; his interest must stand or fall according to the determination which the Court shall make on the national character of such a person.

"There are two propositions which are not to be controverted: that Mr. Johnson is an American generally by birth, which is the circumstance that first impresses itself on the mind of the Court; and also by the part which he took on the breaking out of the American War. He came hither when both countries were open to him; but on the breaking out of hostilities, he made his election which country he would adhere to, and in consequence thereof went to France. As to the doubt that has been suggested, whether he would be deemed an American, not having been personally there at the time of the declaration of the independence of that country, I think that is sufficiently cleared up by the circumstances of his being adopted as such by the act of the American Government, declaring him and his family to be American subjects, and by the official character which that Government has entrusted to him; I am of opinion, therefore, that he has not lost the benefit of his native American character. He came, however, to this country in 1783, and engaged in trade, and has resided in this country till 1797; during that time he was undoubtedly to be considered as an English trader; for no

position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country; I should therefore have no doubt in pronouncing that Mr. Johnson was to be considered as a merchant of this country at the time of sailing of this vessel on her outward voyage. That leads me to take a view of the circumstances of this case: the ship went out in 1795 with Mr. Hewlet on board, and Mr. Johnson says, 'he sent out Mr. Hewlet as supercargo, and put the vessel under his control to take freight for America, but that his designs were frustrated by various circumstances'; and the ship actually went to Madeira, Madras, Tranquhar, and Batavia, and from thence to Cowes, where she was arrested.

"Now there can be no doubt that if Mr. Johnson had continued where he was at the time of sailing, if he had remained resident in England, it must be considered as a British transaction, and therefore a criminal transaction, on the common principle that it is illegal in any person owing an allegiance, though temporary, to trade with the public enemy. But it is pleaded that he had quitted this country before the capture, and that he had done this in consequence of an intention he had formed of removing much earlier, but that he had been prevented by obstacles that obstructed his wish; to this effect the letter of March 1797 is exhibited, which must have been preceded by private correspondence and application to some of his creditors. It does, I think, breathe strong expressions of intention, and of an ardent desire to get over the restraint that alone detained him; and it affords conclusive reason to believe that if he had been a free man, and at liberty to go where he pleased, he would have removed long before; and that he was detained here as a hostage, as he describes himself, to his creditors, on motives of honour creditable to his character. On September 9, 1797, he did actually retire; of the sincerity of his quitting this country there can hardly be a doubt entertained; it is almost impossible to represent stronger or more natural grounds for such a measure; and I do not

think the Court runs any risk of encountering a fraudulent pretension, put forward to meet the circumstances of the moment, without anything of an original and *bona fide* intention at the bottom of it.

"The ship arrives a few weeks after his departure; and taking it to be clear that the national character of Mr. Johnson as a British merchant was founded in residence only, that it was acquired by residence and rested on that circumstance alone, it must be held that from the moment he turns his back on the country where he has resided, on his way to his own country he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence; it is an adventitious character which no longer adheres to him from the moment that he puts himself in motion, *bona fide*, to quit the country, *sine animo revertendi*. The Courts that have to apply this principle have applied it both ways, unfavourably in some cases and favourably in others. This man had actually quitted the country. Stronger was the case of Mr. Curtissos (The *Snelle Zeylder*, Lds. Ap. 25, 1783): he was a British-born subject that had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country; but he had got no farther than Holland, the mother country of those settlements, when the war broke out. It was determined by the Lords of Appeal that he was *in itinere*, that he had put himself in motion, and was in pursuit of his native British character; and as such, he was held to be entitled to the restitution of his property. So here, this gentleman was in actual pursuit of his American character; and, I think, there can be no doubt that his native character was strongly and substantially revived, not occasionally not colourably, for the mere purpose of the present claim; and therefore I shall restore the ship."

(2) As regards the cargo on the same vessel, , a claim was put in by Mr. Millar, who was described as American Consul at Calcutta. In rejecting his claim and condemning the cargo, Lord Stowell laid down the general principles as to the character of

persons having a trade domicile in the East and as to the position of a consul carrying on commerce:

"On the part of the claimant many grounds have been taken. I am first reminded that he was American consul, though it is not distinctly avowed that his consular character is expected to protect him; nor could it be with property or effects, it being a point fully established in these Courts [*i.e.* the Admiralty Court] that the character of consul does not protect that of merchant united in the same person.

". . . Another ground is that he was not resident in the British territory, for that the sovereign of the country is not in possession of Bengal with the same imperial rights as belong to the Mogul. It is contended on this point that the King of Great Britain does not hold the British possessions in the East Indies in right of sovereignty, and therefore that the character of British merchant does not necessarily attach to a foreigner locally resident there. But taking it that such a paramount sovereignty on the part of the Mogul princes really exists, and that Great Britain cannot be deemed to possess a sovereign right there; still it is to be remembered that wherever even a mere factory is founded in the Eastern parts of the world, European persons trading under the shelter and protection of their establishments are conceived to take the national character from that association under which they live and carry on their commerce. It is a rule of the law of nations applying peculiarly to these countries, and it is different from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries. In the western parts of the world alien merchants mix in the society of natives . . . and they become incorporated to almost the full extent. But in the East from the oldest time an immiscible character has been kept up: foreigners are not admitted into the general body and mass of the society of the natives; they continue strangers and sojourners, as all their fathers were; not acquiring any

national character under the general sovereignty of the country, and not trading under any recognised authority of their original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade."

Note.—The law as to commercial domicile is not applied as strictly to-day. The great American judge, Marshall, doubted its expediency in the *Venus* (8 Cranch 263 at p. 279), and in the case of the *Nigel Gold Mining Company* v. *Hoade* (1901, 2 K.B. 849) Mathew J. said: "The opinion would seem to be that a subject of our country, surprised by a declaration of war in the country where he has a commercial domicile, ought to have time allowed him to free himself from his commercial engagements and effect a removal of his property." The plaintiffs were a company registered in a British colony and owning a gold mine in the Transvaal. When war was declared between England and the Transvaal some of their gold was seized by the Transvaal Government. The gold was consigned to an English company and they brought an action on the policy to recover in respect of the seizure. It was urged that when the war broke out the policy ceased to be effective because the subject-matter of the insurance must be deemed to have been enemies' property. But the Court would not accede to this argument nor allow that the gold became enemies' property merely by reason of the commercial domicile of the company when war was declared.

THE "HARMONY," 1800.

2 C. Rob. 322.

Time is the most important ingredient in constituting trade domicile for the purpose of determining character.

Case.—The *Harmony* was an American vessel in which a claim had been reserved for part of the cargo, in order to determine the national character of G. W. Murray, partner of a house of trade in America, but personally resident in France.

Mr. Murray had gone to France in 1794 as supercargo of a vessel, in behalf of his firm, to dispose there of the cargo; but with the exception of a brief visit to America in 1795–96, he continued to reside in France, and to receive and dispose of cargoes sent out from New York, and it was urged that he had therefore French belligerent character.

Judgment (Sir W. Scott).—"This is a question which arises on several parcels of property claimed on behalf of G. W. Murray; and it is in all of them a question of residence or domicile, which, I have often had occasion to observe, is in itself a question of considerable difficulty, depending on a great variety of circumstances, hardly capable of being defined by any general precise rules. The active spirit of commerce now abroad in the world still further increases this difficulty by increasing the variety of local situations, in which the same individual is to be found at no great distance of time; and by that sort of extended circulation, if I may so call it, by which the same transaction communicates with different countries, as in the present cases, in which the same trading adventures have their origin (perhaps) in America, travel to France, from France to England, from England back to America again, without enabling us to assign accurately the exact legal effect of the local character of every particular portion of this divided transaction.

"Of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not infrequently said that if a person comes only for a special purpose, *that* shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that *may*, *probably*, or *does actually* detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose.

"A special purpose may lead a man to a country where it shall detain him the whole of his life. A man comes here to follow a lawsuit, it may happen, and indeed is often used as a ground of vulgar and unfounded reproach (unfounded as matter of just reproach though the fact may be true) on the laws of this country, that it may last as long as himself. Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that against such a long residence,

the plea of an original special purpose could not be averred; it must be inferred in such a case that other purposes forced themselves upon him and mixed themselves with his original design, and impressed upon him the character of the country where he resided.

"Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes, and other means, to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there *must* be.

"In proof of the efficacy of mere time, it is not impertinent to remark that the same quantity of business which would not fix a domicile in a certain space of time would, nevertheless, have that effect if distributed over a large space of time. Suppose an American comes to Europe with six contemporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe with one cargo, and fixing himself there, to receive five remaining cargoes, one in each year successively. I repeat that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicile."

Note.—The Declaration of London has not altered the rule in England as to enemy character except in minor points: by Articles 57 & 58 the neutral or enemy character of a vessel is determined by the flag she is entitled to fly, and the character of goods by the neutral or enemy character of the owner, and this depends by English law on his commercial domicile.

Transfer of Enemy Vessels to Neutrals.

Cf. Oppenheim, s. 91; Lawrence, 156; Hall, p. 501; Westlake, vol. ii. p. 147.

THE "BALTICA" (SORENSEN v. THE QUEEN), 1857.

11 Moore, Privy Council Cases, 141.

A bona fide sale by an enemy to a neutral when war is imminent and while the vessel is in transit is valid, if the vessel comes into possession of the purchaser before seizure.

Case.—The *Baltica* was a Russian ship which in March 1854, shortly before the breaking out of war between Russia and Great Britain, was sold by Sorensen senior, a merchant domiciled in Russia, to his son, who was domiciled in Denmark. At the time of the sale the vessel was proceeding from Libau to Copenhagen, and on her arrival at the latter port she was delivered over to the appellants' agents and her Russian flag was changed for the Danish flag. Subsequently she was seized by an English cruiser and condemned as an enemy vessel.

The Judicial Committee of the Privy Council allowed the appeal against the sentence and ordered her release.

Judgment (Rt. Hon. Pemberton Leigh, afterwards Lord Kingsdown).—"The general rule is open to no doubt. A neutral, while a war is imminent or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from the belligerents, and the purchase is valid, whether the subject of it be lying in a neutral port or an enemy's port. During a time of peace without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee is also good against the captor, if war afterwards unexpectedly breaks out. But in case of war, either actual or imminent, this rule is subject to qualification, and it is settled in such a case that a

mere transfer by documents, which would be sufficient to bind the parties, is not sufficient to change the property as against captors as long as the ship or goods remain *in transitu*.

"The only question of law which can be raised in this case is not whether a transfer of ship or goods *in transitu* is ineffectual to charge the property as long as the state of *transitus* lasts, but how long that state continues and when and by what means it is terminated.

"In order to determine the question, it is necessary to consider upon what principle the rule rests and why it is that a sale which would be perfectly good if made while the property was at a neutral port or in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to another. There seem to be but two possible grounds of distinction. The one is that while the ship is on the seas the title of the vendee cannot be completed by the actual delivery of the vessel or goods; the other is that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent Powers until the voyage is at an end.

"The former, however, appears to be the true ground on which the rule rests. Such transactions during war or in contemplation of war are so likely to be merely colourable, to be set up for the purpose of misleading or defrauding captors—the difficulty of detecting frauds, if mere paper transfers are held valid, is so great—that the Courts have laid down as a general rule that such transfers without actual delivery shall be insufficient—that, in order to defeat the captors, the possession as well as the property must be changed before the seizure. It is true that in one sense the ship and goods may be said to be *in transitu* till they have reached the original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner. . . ."

Note.—The Declaration of London deals likewise with this question of belligerent rights against neutrals (Articles 55 & 56) and establishes fixed

rules as to the validity or invalidity by transfers made during or within a certain period from the commencement of hostilities. There is an absolute presumption that a transfer is void if it is made during a voyage after the outbreak of hostilities. And by the established English practice, if a belligerent subject retains a share in a vessel transferred to a neutral or a lien, the share or the lien may be confiscated (*The Ariel*, 11 Moo. 119).

THE "SALLY," 1795.

3 C. Robinson, 300, *note*.

Merchandise shipped to become the property of the enemy on arrival, if taken in transitu, is to be condemned as enemy's property. Supposing it was to become the property of the enemy on delivery, capture is considered as delivery.

Case.—The *Sally* was a case of a cargo of corn shipped March 1793 by Steward and Plunket, of Baltimore, ostensibly for the account and risk of Conyngham, Nesbit and Co., of Philadelphia, and consigned to them *or their assigns*. By an endorsement of the bill of lading, it was further agreed that the ship should proceed to Havre de Grace, and there await, such time as might be necessary, the orders of the consignee of the said cargo (the Mayor of Havre) either to deliver the same at the port of Havre or proceed therewith to any one port without the Mediterranean.

Amongst the papers was a concealed letter from Jean Ternant, the Minister of the French Republic to the United States, in which he informs the Minister of Foreign Affairs in France: "The house of Conyngham and Co., already known to the ministers by their former operations for France, is charged by me to procure without delay a consignment of 22,000 bushels of wheat, 8000 barrels of fine flour, 900 barrels of salted beef from New England. . . . It has been agreed, considering the actual reports of war, that the whole shall be sent as American property to Havre and to Nantes, with power to our Government of sending the ships to other ports conditional on the usual freight. As you have not signified to me to whom these cargoes ought to be delivered

in our ports, I shall provide each captain with a letter to the mayor of the place."

Judgment.—"It has always been the rule of the Prize Courts that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemy's property. Where the contract is made in time of peace or without any contemplation of a war, no such rule exists; but in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses account and risk of the American merchants; but papers alone make no proof, unless supported by the depositions of the master. Instead of supporting the contents of his papers, the master deposes 'that on arrival the goods would become the property of the French Government,' and all the concealed papers strongly support him in this testimony. The *evidentia rei* is too strong to admit further proof. Supposing that it was to become the property of the enemy on delivery, capture is considered as delivery. The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property. On every principle on which Prize Courts can proceed, this cargo must be considered as enemy's property."

Note.—The rule that goods shipped in time of war or in contemplation thereof are held to belong to the consignee and if the consignee is an enemy are confiscated was laid down in *The Packet de Bilboa* (1799, 2 C. Rob. 133). The Declaration of London adopts this rule in Article 60 which provides that enemy goods on board an enemy vessel retain their enemy character till they reach their destination, notwithstanding any transfer.

CHAPTER XV.

EFFECTS OF MILITARY OCCUPATION.

Cf. Oppenheim, ii. ss. 169–171; Lawrence, 178–179; Hall, pp. 464 ff.; Westlake, vol. ii. pp. 43 ff.

UNITED STATES v. RICE, 1819.

United States Supreme Court (4 Wheaton 246).

A military occupant is entitled to exercise regular rights of government, and his acts should be upheld by the territorial sovereign when he resumes possession of the occupied territory.

Case.—During the war of 1812 between England and the United States the port of Castine, in Maine, which is near the Canada border, was captured by the British in 1814. They established a custom-house and imposed duties upon goods imported there. Citizens of the United States who were domiciled in Castine remained during this occupation, imported goods and paid duty upon them to the British authorities. In 1815, after the ratification of the Treaty of Peace, the United States resumed possession of the port, and the collector of that district claimed that duties were payable to the United States upon the goods which remained in the port and had not been consumed. The Supreme Court of the United States, however, held that transactions under the authority of the British law which took place and were consummated during the occupation were valid.

Judgment.—Mr. Justice Story thus stated the rule:

". . . Under these circumstances we are of opinion that

the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognise and impose. From the nature of the case, no other laws could be obligatory upon them; for where there is no protection or allegiance, or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British Government chose to require. Such goods were, in no correct sense, imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions."

Note.—The administrative rights of a military occupant do not however extend to the degree of full sovereignty. He cannot, for example, require the Courts to exercise their functions in the name of the occupying Power or compel the population of the occupied territory to take the oath of allegiance to the military Power. The Hague Laws of War drawn up by the Peace Conference of 1900 provide (Rule XLIII) that the military occupant is to take all possible steps to ensure public order, while respecting, unless absolutely prevented, the laws in force in the country.

THE "GERASIMO," 1868.

11 Moore P.C. 88.

A temporary occupation of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies.

Case.—The *Gerasimo* was a vessel sailing under Wallachian colours which was seized by an English cruiser during the Crimean War. It was claimed that she was a good prize, because Wallachia, being at the time occupied by Russian troops, was hostile territory and its inhabitants were enemies.

The Lords of the Privy Council rejected the claim and ordered the release of the vessel.

Judgment.—"Upon the appeal, the first question is whether the owners of the cargo, in regard to this claim, are to be considered as alien enemies; and for this purpose it will be necessary to examine carefully both the principles of law which are to govern the case and the nature of the possession which the Russians held of Moldavia at the time of this shipment. Upon the general principles of law applicable to this subject, there can be no dispute. The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purpose of the trade, as a subject of the Power under whose dominion he carries it on, and, of course, as an enemy of those with whom that Power is at war. Nothing can be more just than this principle; but the whole foundation of it is that the country in which the merchant trades is enemy's country. Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's terri-

tory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile Power, so far as such Power may think fit to exercise control? or is it necessary that, either by cession or conquest or some other means it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises? It appears to their Lordships that the first proposition cannot be maintained. With respect to the meaning of the term 'dominions of the enemy,' and what is necessary to constitute dominion, Lord Stowell has in several cases expressed his opinion. In the case of the *Fama* (5 Rob. 115) he lays it down that, in order to complete the right of property, there must be both right to the thing and possession of it both *jus ad rem* and *jus in re*. 'This,' he observes, 'is the general law of property, and applies, I conceive, no less to the "right of territory" than to other rights. Even in newly discovered countries when a title is meant to be established for the first time, some act of possession is usually done, and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public act, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion and under what law they are to live.' The importance of this doctrine will appear when the facts with respect to the occupation of the principalities come to be examined. That the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force is a principle held to be of such importance that it was acted upon by the Lords of Appeal in 1808, in the St. Domingo cases of the *Dart* and *Happy Couple*, when the rule operated with extreme hardship.

"On the other hand, when places in a friendly country have been seized by and are in possession of the enemy, the same doctrine has been held. While Spain was in the occupation of

France and at war with Great Britain the Spanish Insurrection broke out, and the British Government issued a proclamation that all hostilities against Spain should immediately cease. Great part of Spain, however, was still occupied by the French troops, and, amongst others, the port of St. Andero. A ship called the *Santa Anna* was captured on a voyage, as it was alleged, to St. Andero, and Lord Stowell (1 Edw. 182) observed: 'Under these public declarations of the State, establishing this general peace and amity, I do not know that it would be in the power of the Court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under circumstances which would justify the confiscation of neutral property.'"

After citing further cases the judgment continued:

"These authorities, with the other cases cited at the Bar, seem to establish the proposition that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies. From the nature of the possession of Moldavia by the Russians at the time when the shipment in question was made, it seems impossible to hold that, by means of an occupation so taken, so continued, and so terminated, Moldavia ever became part of the dominions of Russia, and its inhabitants subjects of Russia, and, therefore, enemies of those with whom Russia was at war. The utmost to which the occupation could be held to amount was a temporary suspension of the *suzeraineté* of the Porte, and a temporary assumption of that *suzeraineté* by Russia; but the national character of the country remained unaltered, and any intention to alter it was disclaimed by Russia. At what period, then, could foreigners dwelling there be said to have that notice of a change in the dominion and in the laws under which they were to live to which Lord Stowell refers in the case of the *Fama*?[1] At what period were they under the obligation of changing their domicile in it, under the penalty, if they omitted to do so, of being treated as enemies of Great

[1] *See above*, p. 51.

Britain? Moldavia and Wallachia were not treated by the Porte as enemies, and it would be singular if these countries, though not held to be enemies by Turkey, should be held to be enemies of the allies of Turkey. That the Wallachian flag was recognised, both by the Russian and Turkish authorities, sufficiently appears from the documents before the Court; and their Lordships have ascertained by communication with the Foreign Office the other facts above stated; and, further, that no act was ever done by the British Government to change the national character of the provinces in relation to Great Britain; and without some such act the occupation by the Russians, under the circumstances stated, could not produce such an effect."

Note.—This reasoning would probably apply to the vessels and goods of the inhabitants of colonial protectorates of the Great Powers in time of war. *See* the case of the Ionian ships (*above*, p. 19), where it was held that that the subjects of a protected country do not necessarily become enemies of the enemies of the protecting State.

The inhabitants of the occupied territory, though they may be subjects of the occupying Power, are not by English law justified in assisting the occupant in his operations; and they may be tried for treason if they do so and are captured by the former sovereign. Cf. *De Jager* v. *Attorney-General of Natal* (*above*, p. 142).

CHAPTER XVI.

LAW OF NEUTRALITY.

Cf. Oppenheim, ss. 291 and 311; Lawrence, 223; Hall, 607 ff. Westlake, vol. ii. pp. 181–200.

THE FOREIGN ENLISTMENT ACT, 1870.

Following the American Civil War and the claims made against Great Britain at its conclusion by the Federal Government on account of the alleged negligence of this country in regard to its neutral obligations, a very drastic Foreign Enlistment Act was passed in 1870 to reinforce the powers of the State, which were given by an Act of 1819, to prevent violations of its neutrality by its subjects. The material parts of the Act are here set out as they appear embodied in the proclamation which is regularly issued by the King at the outbreak of a war in which Great Britain is neutral. The proclamation chosen is that issued at the opening of the Turco-Balkan War in 1912, and it illustrates how the Foreign Enlistment Act is applied:

By the KING.

A PROCLAMATION.

GEORGE R.I.

Whereas We are happily at Peace with all Sovereigns, Powers, and States:

And whereas a State of War unhappily exists between His Imperial Majesty The Sultan of Turkey and His Majesty The King of the Bulgarians; between His Imperial Majesty The

Sultan of Turkey and His Majesty The King of the Hellenes; between His Imperial Majesty The Sultan of Turkey and His Majesty The King of Montenegro; and between His Imperial Majesty The Sultan of Turkey and His Majesty the King of Servia; and between their respective Subjects, and others inhabiting within their Countries, Territories, or Dominions:

And whereas We are on Terms of Friendship and amicable intercourse with each of these Powers, and with their several Subjects, and others inhabiting within their Countries, Territories, or Dominions:

And whereas great Numbers of Our Loyal Subjects reside and carry on Commerce, and possess Property and Establishments, and enjoy various Rights and Privileges, within the Dominions of each of the aforesaid Powers, protected by the Faith of Treaties between Us and each of the aforesaid Powers:

And whereas We, being desirous of preserving to Our Subjects the Blessings of Peace, which they now happily enjoy, are firmly purposed and determined to maintain a strict and impartial Neutrality in the said State of War unhappily existing between the aforesaid Powers:

We, therefore, have thought fit, by and with the advice of Our Privy Council, to issue this Our Royal Proclamation:

And We do hereby strictly charge and command all Our loving Subjects to govern themselves accordingly, and to observe a strict neutrality in and during the aforesaid War, and to abstain from violating or contravening either the Laws and Statutes of the Realm in this behalf, or the Law of Nations in relation thereto, as they will answer to the contrary at their peril:

And whereas in and by a certain Statute made and passed in a Session of Parliament holden in the 33rd and 34th year of the reign of Her late Majesty Queen Victoria, intituled "An Act to regulate the conduct of Her Majesty's Subjects during the existence of Hostilities between Foreign States with which Her Majesty is at Peace," it is, among other things, declared and enacted as follows:—

"This Act shall extend to all the Dominions of Her Majesty, including the adjacent territorial Waters.

"*Illegal Enlistment.*

"If any Person, without the Licence of Her Majesty, being a British Subject, within or without Her Majesty's Dominions, accepts or agrees to accept any Commission or Engagement in the Military or Naval Service of any Foreign State at War with any Foreign State at Peace with Her Majesty, and in this Act referred to as a friendly State, or, whether a British Subject or not, within Her Majesty's Dominions, induces any other Person to accept or agree to accept any Commission or Engagement in the Military or Naval Service of any such Foreign State as aforesaid—

"He shall be guilty of an Offence against this Act, and shall be punishable by Fine and Imprisonment, or either of such punishments, at the discretion of the Court before which the Offender is convicted; and Imprisonment, if awarded, may be either with or without Hard Labour.

"If any Person, without the Licence of Her Majesty, being a British Subject, quits or goes on board any Ship with a view of quitting Her Majesty's Dominions, with intent to accept any Commission or Engagement in the Military or Naval Service of any Foreign State at War with a friendly State, or, whether a British Subject or not, within Her Majesty's Dominions, induces any other Person to quit or to go on board any Ship with a view of quitting Her Majesty's Dominions with the like intent—

"He shall be guilty of an Offence against this Act, and shall be punishable by Fine and Imprisonment, or either of such punishments, at the discretion of the Court before which the Offender is convicted; and Imprisonment, if awarded, may be either with or without Hard Labour.

"If any Person induces any other Person to quit Her Majesty's Dominions or to embark on any Ship within Her Majesty's

Dominions under a Misrepresentation or false Representation of the Service in which such Person is to be engaged, with the intent or in order that such Person may accept or agree to accept any Commission or Engagement in the Military or Naval Service of any Foreign State at War with a friendly State—

"He shall be guilty of an Offence against this Act, and shall be punishable by Fine and Imprisonment, or either of such punishments, at the discretion of the Court before which the Offender is convicted; and Imprisonment, if awarded, may be with or without Hard Labour.

"If the Master or Owner of any Ship, without the Licence of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such Ship within Her Majesty's Dominions any of the following Persons in this Act referred to as illegally enlisted Persons, that is to say:—

"(1) Any Person who, being a British Subject within or without the Dominions of Her Majesty, has, without the Licence of Her Majesty, accepted or agreed to accept any Commission or Engagement in the Military or Naval Service of any Foreign State at War with any friendly State;

"(2) Any Person, being a British Subject, who, without the Licence of Her Majesty, is about to quit Her Majesty's Dominions with intent to accept any Commission or Engagement in the Military or Naval Service of any Foreign State at War with a friendly State;

"(3) Any Person who has been induced to embark under a Misrepresentation or false Representation of the service in which such Person is to be engaged, with the intent or in order that such Person may accept or agree to accept any Commission or Engagement in the Military or Naval Service of any Foreign State at War with a friendly State;

"Such Master or Owner shall be guilty of an Offence against this Act, and the following Consequences shall ensue, that is to say:—

"(1) The Offender shall be punishable by Fine and Imprisonment, or either of such punishments, at the discretion of the Court before which the Offender is convicted; and Imprisonment, if awarded, may be either with or without Hard Labour; and

"(2) Such Ship shall be detained until the Trial and Conviction or Acquittal of the Master or Owner, and until all Penalties inflicted on the Master or Owner have been paid, or the Master or Owner has given Security for the Payment of such Penalties to the Satisfaction of Two Justices of the Peace, or other Magistrate or Magistrates having the Authority of Two Justices of the Peace; and

"(3) All illegally enlisted Persons shall immediately on the Discovery of the Offence be taken on Shore, and shall not be allowed to return to the Ship.

"*Illegal Shipbuilding and Illegal Expeditions.*

"If any Person within Her Majesty's Dominions, without the Licence of Her Majesty, does any of the following acts, that is to say:—

"(1) Builds, or agrees to build, or causes to be built, any Ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the Military or Naval Service of any Foreign State at War with any friendly State; or

"(2) Issues or delivers any Commission for any Ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the Military or Naval Service of any Foreign State at War with any friendly State; or

"(3) Equips any Ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the Military or Naval Service of any Foreign State at War with any friendly State; or

"(4) Despatches, or causes or allows to be despatched, any

Ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the Military or Naval Service of any Foreign State at War with any friendly State;

"Such Person shall be deemed to have committed an Offence against this Act, and the following Consequences shall ensue:—

"(1) The Offender shall be punishable by Fine and Imprisonment, or either of such punishments, at the discretion of the Court before which the Offender is convicted; and Imprisonment, if awarded, may be either with or without Hard Labour;

"(2) The Ship in respect of which any such Offence is committed and her Equipment shall be forfeited to Her Majesty;

"Provided that a Person building, causing to be built, or equipping a Ship in any of the cases aforesaid, in pursuance of a Contract made before the commencement of such War as aforesaid, shall not be liable to any of the Penalties imposed by this Section in respect of such building or equipping if he satisfies the conditions following (that is to say):—

"(1) If forthwith, upon a Proclamation of Neutrality being issued by Her Majesty, he gives Notice to the Secretary of State that he is so building, causing to be built, or equipping such Ship, and furnishes such Particulars of the Contract and of any matters relating to, or done, or to be done under the Contract as may be required by the Secretary of State:

"(2) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such Ship shall not be despatched, delivered, or removed without the Licence of Her Majesty until the termination of such War as aforesaid.

"Where any ship is built by order of or on behalf of any Foreign State when at War with a friendly State, or is delivered to or to the order of such Foreign State, or any Person who

to the Knowledge of the Person building is an Agent of such Foreign State, or is paid for by such Foreign State or such Agent, and is employed in the Military or Naval Service of such Foreign State, such Ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the Burden shall lie on the Builder of such Ship of proving that he did not know that the Ship was intended to be so employed in the Military or Naval Service of such Foreign State.

"If any Person within the Dominions of Her Majesty, and without the Licence of Her Majesty—

"By adding to the number of the Guns, or by changing those on board for other Guns, or by the addition of any Equipment for War, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike Force of any Ship which at the time of her being within the Dominions of Her Majesty was a Ship in the Military or Naval Service of any Foreign State at War with any friendly State—

"Such Person shall be guilty of an Offence against this Act, and shall be punishable by Fine and Imprisonment, or either of such punishments, at the Discretion of the Court before which the Offender is convicted; and Imprisonment, if awarded, may be either with or without Hard Labour.

"If any Person within the limits of Her Majesty's Dominions, and without the Licence of Her Majesty—

"Prepares or fits out any Naval or Military Expedition to proceed against the Dominions of any friendly State, the following Consequences shall ensue:—

"(1) Every Person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such Expedition, shall be guilty of an Offence against this Act, and shall be punishable by Fine and Imprisonment, or either of such punishments, at the discretion of the Court before which the Offender is convicted; and Imprisonment, if awarded, may be either with or without Hard Labour;

"(2) All Ships and their Equipments, and all Arms and Munitions of War, used in or forming part of such Expedition shall be forfeited to Her Majesty.

"Any Person who aids, abets, counsels, or procures the Commission of any Offence against this Act shall be liable to be tried and punished as a principal Offender."

And whereas by the said Act it is further provided that Ships built, commissioned, equipped, or despatched in contravention of the said Act may be condemned and forfeited by Judgment of the Court of Admiralty; and that if the Secretary of State or Chief Executive Authority is satisfied that there is a reasonable and probable cause for believing that a Ship within Our Dominions has been or is being built, commissioned, or equipped contrary to the said Act, and is about to be taken beyond the limits of such Dominions, or that a Ship is about to be despatched contrary to the Act, such Secretary of State or Chief Executive Authority shall have power to issue a warrant authorising the seizure and search of such Ship and her detention until she has been either condemned or released by Process of Law. And whereas certain powers of seizure and detention are conferred by the said Act on certain Local Authorities;

Now, in order that none of Our Subjects may unwarily render themselves liable to the Penalties imposed by the said Statute, We do hereby strictly command that no Person or Persons whatsoever do commit any Act, Matter, or Thing whatsoever contrary to the Provisions of the said Statute, upon pain of the several Penalties by the said Statute imposed and of Our high Displeasure.

And We do hereby further warn and admonish all Our loving Subjects, and all Persons whatsoever entitled to Our Protection, to observe towards each of the aforesaid Powers, their Subjects and Territories, and towards all Belligerents whatsoever with whom We are at Peace, the Duties of Neutrality; and to respect in all and each of them the Exercise of Belligerent Rights.

And We hereby further warn all Our loving Subjects, and all Persons whatsoever entitled to Our Protection, that if any of

them shall presume, in contempt of this Our Royal Proclamation, to do any acts in derogation of their Duty as Subjects of a Neutral Power in a War between other Powers, or in violation or contravention of the Law of Nations in that behalf, all Persons so offending will rightfully incur and be justly liable to the Penalties denounced by such Law.

And We do hereby give Notice that all Our Subjects and Persons entitled to Our Protection who may misconduct themselves in the Premises will do so at their peril, and of their own wrong; and that they will in no wise obtain any Protection from Us against such Penalties as aforesaid.

Note.—The provisions against foreign enlistment have been applied against persons who organised a raid for political purposes against a Power which was at peace with England (*cf. Reg.* v. *Jameson*, 1897, 1 Q.B. 1).

GENEVA AWARD, 1872.

Cf. Oppenheim, ii. s. 335; Lawrence, 234–240; Westlake, vol. ii. p. 197; Hall, p. 607 ff.

Case.—During the Civil War in the United States between the Federal Government and the Confederate States a number of armed vessels left English ports, and subsequently operated as cruisers for the Confederates and committed severe depredations on the commerce of the Federals. At the conclusion of the war the United States Government made a claim against Great Britain for the losses its citizens had suffered through the action of these vessels, which it was said had been allowed to leave port in defiance of the obligations of neutrality.

The claim was submitted to arbitration at Geneva, and Article VI. of the Treaty of Washington of 1871, providing, among other things, for this arbitration, declared:

"In deciding the matters submitted to the arbitrators they shall be governed by the following three rules, which are agreed upon by the high contracting parties, as rules to be taken as applicable to the case, and by such principles of international

law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case:

"RULES.

"A neutral Government is bound—

"First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"Thirdly. To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

"Her Britannic Majesty has commanded her high commissioners and plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of the principles of international law which were in force at the time when the claims mentioned in Article I. arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries, arising out of those claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

"And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them."

The arbitrators, after hearing the case, made the following award:

"The tribunal having since fully taken into their consideration the treaty and also the cases, counter-cases, documents, evidence,

and arguments, and likewise all other communications made to them by the two parties during the progress of their sittings, and having impartially and carefully examined the same,

"Has arrived at the decision embodied in the present award:

"Whereas, having regard to the sixth and seventh articles of the said treaty, the arbitrators are bound under the terms of the said sixth article, 'in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith as the arbitrators shall determine to have been applicable to the case;'

"And whereas the 'due diligence,' referred to in the first and third of the said rules, ought to be exercised by neutral Governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part;

"And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's Government of all possible solicitude for the observance of the rights and duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861;

"And whereas the effects of a violation of neutrality, committed by means of the construction, equipment, and armament of a vessel is not done away with by any commission which the Government of the belligerent Power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offence is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence.

"And whereas the privilege of extra-territoriality, accorded to vessels of war, has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different

nations, and, therefore, can never be appealed to for the protection of acts done in violation of neutrality;

"And whereas the absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

"And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances, of time, of persons, or of place, which may combine to give them such character;

"And whereas, with respect to the vessel called the *Alabama*, it clearly results from all the facts relative to the construction of the ship, at first designated by the number '290,' in the port of Liverpool, and its equipment and armament in the vicinity of Terceira, through the agency of the vessels called the *Agrippina* and the *Bahama*, despatched from Great Britain to that end, that the British Government failed to use due diligence in the performance of its neutral obligations, and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number '290,' to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late their their execution was not practicable;

"And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

"And whereas, in despite of the violations of the neutrality of Great Britain, committed by the '290,' this same vessel, later known as the Confederate cruiser *Alabama*, was on several occasions freely admitted into the ports of the colonies of Great Britain, instead of being proceeded against as it ought to have

been in any and every port within British jurisdiction in which it might have been found ;

" And whereas the Government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed :

" Four of the arbitrators for the reasons above assigned, and the fifth for reasons separately assigned by him, are of opinion that Great Britain has in this case failed, by omission, to fulfil the duties prescribed in the first and the third of the rules, established by the sixth article of the treaty of Washington.

" And whereas, with respect to the vessel called the *Shenandoah*, it results from all the facts relative to the departure from London of the merchant vessel, the *Sea King*, and to the transformation of that ship into a Confederate cruiser under the name of the *Shenandoah*, near the island of Madeira, that the Government of Her Britannic Majesty is not chargeable with any failure, down to that date, in the use of due diligence to fulfil the duties of neutrality ;

" But whereas it results from all the facts connected with the stay of the *Shenandoah* at Melbourne, and especially with the augmentation which the British Government itself admits to have been clandestinely effected of her force, by the enlistment of men within that port, that there was negligence on the part of the authorities at that place ;

" For these reasons the tribunal is unanimously of opinion that Great Britain has not failed, by any act or omission, ' to fulfil any of the duties prescribed by the three rules of Article VI. in the Treaty of Washington, or by the principles of international law not inconsistent therewith,' in respect to the vessel called the *Shenandoah*, during the period of time anterior to her entry into the port of Melbourne ;

" And, by a majority of three to two voices, the tribunal decides that Great Britain has failed, by omission, to fulfil the duties prescribed by the second and third of the rules aforesaid, in the case of this same vessel, from and after her entry into Hobson's Bay, and is, therefore, responsible for all acts com-

mitted by that vessel after her departure from Melbourne, on the 18th day of February, 1865.

"And so far as relates to the vessels called the *Tuscaloosa* (tender to the *Alabama*), the *Clarence*, the *Tacony*, and the *Archer* (tenders to the *Florida*), the tribunal is unanimously of opinion that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively.

"And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the Confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States;

"The tribunal is, therefore, of opinion, by a majority of three to two voices, that there is no ground for awarding to the United States any sum by way of indemnity under this head.

"And whereas prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies;

"The tribunal is unanimously of opinion that there is no ground for awarding to the United States any sum by way of indemnity under this head.

"And whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses, and all claims for 'gross freights,' so far as they exceed 'net freights';

"And whereas it is just and reasonable to allow interest at a reasonable rate;

"And whereas, in accordance with the spirit and letter of the Treaty of Washington, it is preferable to adopt the form of adjudication of a sum in gross, rather than to refer the subject of compensation for further discussion and deliberation to a board of assessors, as provided by Article X. of the said treaty;

"The tribunal, making use of the authority conferred upon it by Article VII. of the said treaty, by a majority of four voices

to one, awards to the United States a sum of $15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims referred to the consideration of the tribunal, conformable to the provisions contained in Article VII. of the aforesaid treaty.

"And, in accordance with the terms of Article XI. of the said treaty, the tribunal declares that 'all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled.'

"Furthermore, it declares that 'each and every one of the said claims, whether the same may or may not have been presented to the notice of, or made, preferred, or laid before the tribunal, shall henceforth be considered and treated as finally settled, barred, and inadmissible.'

"In testimony whereof this present decision and award has been made in duplicate, and signed by the arbitrators who have given their assent thereto, the whole being in exact conformity with the provisions of Article VII. of the said Treaty of Washington."

Note.—Both the rules of the Treaty of Washington and the decision of the Geneva arbitration were much criticised at the time, but the British Government had shown its recognition of the need for a greater care in the carrying out of its neutral obligations by passing the ForeignEnlistment Act 1870 before the arbitration took place. By the Hague Convention of 1907 respecting the Rights and Duties of Neutral Powers in naval war (Art.8) a neutral government is bound to employ all means at its disposal to prevent the fitting out and arming of a vessel within its jurisdiction which it has reason to believe is intended to assist or engage in hostile operations against a Power with which that government is at peace. For the effect of the English Act *see* the cases following.

Obligations of Neutrality.

THE "INTERNATIONAL," 1871.

L.R. 3 Admiralty and Ecclesiastical Courts, 321.

A ship employed in the service of a foreign belligerent State to lay down a submarine cable, the main object of which is, and is known to be, the subserving of the military operations of the belligerent State, is employed in the military or naval service of that State within the meaning of the Foreign Enlistment Act, 1870; but if the main object of the cable is the subserving of the commercial interests of the State, the ship is not so employed.

Case.—At a time when there was war between France and Germany, an English company entered into a contract with the French Government to lay down in the sea a series of telegraph cables, between certain places on the French coast. The places on the coast between which the cables were to be laid were so situated that by means of short telegraph lines carried over land the series of cables could be united in one line, and be made to afford complete telegraphic communication between Dunkerque and Verdon. The company having shipped the telegraph cables on board a steamship belonging to them, specially fitted for the purpose of laying submarine cables, were, during the continuance of the war, about to despatch the steamship from the port of London, to lay down the cables according to the contract, when the steamship was, by order of one of Her Majesty's principal secretaries of State, detained upon the ground that it was about to be despatched contrary to the Foreign Enlistment Act, 1870. On motion for the release of the ship it was proved to the satisfaction of the Court that the undertaking in which the ship was about to be engaged was of a commercial character, and it was held that it should be released.

Judgment (Sir Robert Phillimore).—"This is an application

under the 23rd section of the statute 33 & 34 Vict. c. 90, by the India-rubber, Gutta-percha, and Telegraph Works Company, Limited, the owners of the ship *International* and her cargo, for the release of that vessel and cargo, which have been and are now detained by the order of the Secretary of State under the provisions of the same statute. This statute, passed during the last session, under which the authority of this Court is now for the first time invoked, is, in my judgment, very important and very valuable—strengthening the hands of Her Majesty's Government, and enabling it to fulfil more easily than heretofore that particular class of international obligations which may arise out of the conduct of Her Majesty's subjects towards belligerent foreign States with whom Her Majesty is at peace.

"The statute provides, among other things, 'that if any person within Her Majesty's dominions despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State, such person shall be deemed to have committed an offence against this Act.' Then certain penalties ensue to the person and to the ship. It is with the latter only that this Court is concerned.

"The Act confers special powers on the Secretary of State (sec. 23), which he may exercise in two ways: he may issue a warrant for the detention of a suspected vessel, and then simply detain such vessel, taking no further proceedings, and leaving the owner to make his application for release to this Court, or, he may proceed to obtain the condemnation and forfeiture of the vessel to the Crown. The Secretary of State in this instance has taken the former and milder course, and does not, I am informed by the Attorney-General, think it a case in which further or more serious steps should hereafter be taken. *Interest reipublicæ*, it is said that this vessel should suffer a temporary detention, or, if released by order of this Court, that such release should be accompanied by a special bond, entered into by the owners of the vessel, giving security against any belligerent or

un-neutral use of the vessel or her cargo; but the vessel is not to be proceeded against for any severe penalty. The owners of the *International* and her cargo, however, are applicants to this Court both for the immediate and unconditional release of the vessel and cargo, and for the costs and damages occasioned by the official seizure."

After dealing with the terms of the contract between the French Government and the company, the learned judge continued:

"It has appeared from the material portions of the contract to which I have adverted, as well as from the ordinary functions of the company, that, *primâ facie* at least, this undertaking has not for its object any employment 'in the military or naval service' of France. It was apparently a *bonâ fide* commercial undertaking between the subjects of Her Majesty and a Government in friendly relations with her. And the Attorney-General was express and clear in his statement that no *mala fides* or deception of any kind was imputed to the company, but a violation, through ignorance, of the law. It was also admitted, as I fully expected it would be, by the Attorney-General that this statute in no way affects the previously existing international law as to contraband; that the proceedings taken in the cause have no reference to an offence of this kind. I have not therefore to consider whether, as suggested by the Queen's Advocate, this vessel might have been seized by a Prussian cruiser as being employed in the service of France, or as carrying contraband of war of a novel kind but falling under the old principle.

"The carrier of contraband may violate the proclamation of the neutral State of which he is a member, and deprive himself of the right to protection from her, but the punishment of his offence is, by the general law of nations, left to the belligerent who has the right of capture. The offence is not cognisable by the municipal law of this country."

After considering the evidence of both parties, the judgment concluded thus:

"The company is formed to furnish ordinary postal telegraphy,

and the contract with the French Government is to furnish telegraphy of this kind only; no other kind is to be furnished. It is inapt, *per se*, for land telegraphy, much more for military telegraphy; it is credibly sworn, I think, that the applicants are no parties, directly or indirectly, to any intention or project of adapting this, so to speak, civil telegraphy to military purposes; no such adaptation is within the letter or spirit of their contract. The present circumstances of France are certainly such as to make the means of communication between her armies and her Government of the utmost value to her. It is probable that this telegraphic line from Dunkerque to Verdon will be partially used for effecting or endeavouring to effect such communication. But neither does this appear to be the main object of the line; nor could it, without additions and adaptations, with which this company has no concern, be made even partially to subserve this end. On the other hand, there is nothing incredible in the statement that commercial interests are largely concerned in the establishment of a postal telegraphic line between Dunkerque and Verdon at the mouth of the Garonne, due regard being had to the great and increasing commercial importance of Bordeaux. It is, however, probable, as I have said, that the line may be occasionally used for military among other purposes; but such a probability is not sufficient to divest the line of its primary and paramount commercial character, and to subject this company to the very severe penalties imposed by the statute."

Judgment for the company.

Note.—This case illustrates the effect of the Foreign Enlistment Act, 1870, which was passed after the award had been made in the *Alabama* arbitration, in order to strengthen the hands of the British executive in securing the proper enforcement of neutral obligations in this country. Power was given under the Act for the Secretary of State to detain any vessel suspected of being about to assist one of the belligerents in his military and naval enterprise. And in this case a vessel had been detained on such suspicion, but in the end it was held that the purpose of the contract was innocuous and therefore the vessel was released. Similarly in the case of *The Gauntlet* (L.R. 3 A. & E., 381), an English vessel which had

been engaged by a French vessel to tow a French prize from the Downs to Dunkirk was held not to have been employed in the military or naval service of France, and therefore no offence had been committed. Under the former Foreign Enlistment Act of 1815 it was held that there must be an intention by some person who had control of the vessel to employ her in the war to bring the vessel within the penalties of the Act (*Attorney-General* v. *Sillem*, 1869, 2 H. & C. 552). But in the present statute it is sufficient if the person who is concerned with the building or the despatching of the ship has reasonable cause to believe that it will be engaged in the military or naval service of any foreign State at war with a friendly State. And a person has been convicted under the Act for sending out guns from England to Venezuela with the intention that they should form part of a naval expedition which was being prepared against the existing Venezuelan Government by revolutionaries (*Reg.* v. *Sanseval*, 56 Law Times Reports 526).

CHAPTER XVII.

BELLIGERENT RIGHTS AGAINST NEUTRALS.

(A) CONTRABAND.

Cf. Oppenheim, ii. ss. 394, 395; Lawrence, 255; Hall, p. 657 ff.; Westlake, vol. ii. p. 246ff.

THE "JONGE MARGARETHA," 1799.

1 C. Rob. 189.

Contraband of War.—Articles of provision are generally not contraband of war, but they may become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it. Where articles of provision are going to a commercial port, the presumption is that they are going there for civil use; contra, if they are going to a port of naval or military equipment, and especially if there be a hostile armament then preparing there.

Case.—This was the case of a Papenberg ship, taken on a voyage from Amsterdam to Brest, with a cargo of cheese, April 1797, when England was at war with France and Holland.

Judgment (Sir W. Scott).—"There is little reason to doubt the property in this case, and therefore, passing over the observations which have been made on that part of the subject, I shall confine myself to the single question: Is this a legal transaction in a neutral, being the transaction of a Papenberg ship carrying Dutch cheese from Amsterdam to Brest, or Morlaix (it

is said), but certainly to Brest; or, as it may be otherwise described, the transaction of a neutral carrying a cargo of provisions, not the product and manufacture of his own country, but of the enemy's ally in the war—of provisions which are a capital ship's store—and to the great port of naval equipment of the enemy.

"If I adverted to the state of Brest at this time, it might be no unfair addition to the terms of the description if I noticed, what was notorious to all Europe at this time, that there was in that port a considerable French fleet in a state of preparation for sallying forth on a hostile expedition; its motions at that time were watched with great anxiety by a British fleet which lay off the harbour for the purpose of defeating its designs. Is the carriage of such a supply to such a place, and on such an occasion, a traffic so purely neutral as to subject the neutral trader to no inconvenience?

"If it could be laid down as a general position, in the manner in which it has been argued, that cheese, being a provision, is universally contraband, the question would be readily answered; but the Court lays down no such position. The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the King's Advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine, and oil were liable to be deemed contraband. 'I do agree,' says he, reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals, 'that corn, wine, and oil will be deemed contraband.'

"These articles of provisions, then, were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of this Court. In much later times

many other sorts of provisions have been condemned as contraband. In 1747, in the *Jonge Andreas*, butter, going to Rochelle, was condemned. How it happened that cheese at the same time was more favourably considered, according to the case cited by Dr. Swabey, I don't exactly know. The distinction appears nice. In all probability the cheeses were not of the species which is intended for ship's use. Salted cod and salmon were condemned in the *Jonge Frederick*, going to Rochelle, in the same year. In 1748, in the *Joannes*, rice and salted herrings were condemned as contraband. These instances show that articles of human food have been so considered, at least where it was probable that they were intended for naval or military use.

"I am aware of the favourable positions laid down upon this matter by Wolfius and Vattel, and other writers of the Continent, although Vattel expressly admits that provisions may, under certain circumstances, be treated as contraband. And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. The Court must therefore look to the circumstances under which this supply was sent.

"Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is that they are of the growth of the country which exports them. In the present case they are the product of another country, and that a hostile country; and the claimant has not only gone out of his way for the supply of the enemy, but he has assisted the enemy's ally in the war by taking off his surplus commodities.

"Another circumstance to which some indulgence, by the practice of nations, is shown is when the articles are in their native and unmanufactured state. Thus, iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage, and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use. In the present case the article falls under this unfavourable

consideration, being a manufacture prepared for immediate use.

"But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ship's use; or whether they were going with a highly probable destination to military use? Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test; if the port is a general commercial port it shall be understood that the articles were going for civil use, although occasionally a frigate or other ship of war may be constructed in that port. *Contra*, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if at the time when the articles were going a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.

"The Court, however, was unwilling in the present case to conclude the claimant on the one point of destination, it being alleged that the cheeses were not fit for naval use, but were merely luxuries for the use of domestic tables. It therefore permitted both parties to exhibit affidavits as to their nature and quality. The claimant has exhibited none; but here are authentic certificates from persons of integrity and knowledge that they are exactly such cheeses as are used in British ships when foreign cheeses are used at all, and that they are exclusively used in French ships of war.

"Attending to all these circumstances, I think myself warranted to pronounce these cheeses to be contraband, and condemn them as such.

"As such, however, the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he has relied; I shall content myself with pronouncing the cargo to be contraband without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor."

Note.—In the *Edward*, 4 C. Rob., 68, it was similarly laid down that the military importance of the supply affects the question of conditional contraband. The rules of the Declaration of London which now regulate the subject of contraband are based on the same principles as are laid down in this judgment. Food-stuffs are contraband when destined for the use of the military and naval forces of the enemy, and certain presumptions are set up as to the destination of cargoes (Article 34); a hostile destination is presumed if the goods are consigned to a fortified place or other places serving as a base for the enemy's armed forces.

Continuous Voyages.

Cf. Oppenheim, ss. 400–401; Lawrence, 257; Hall, p. 667; Westlake, p. 254.

THE "IMINA," 1800.

3 C. Rob. 167.

Goods are not to be condemned as contraband unless captured when destined for a belligerent port.

Case.—The *Imina*, loaded with ship-timber, sailed for the belligerent port of Amsterdam, but when captured the master had changed her course to the neutral port of Embden without knowledge of the owners. The vessel was released.

Judgment (Sir William Scott).—". . . The rule respecting contraband, as I have always understood it, is that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you cannot generally take the proceeds in the

return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach. . . .

"The cargo is taken on a voyage to a neutral port. To say that it is nevertheless exposed to condemnation, on account of the original destination as it stood in the mind of the owners, would be carrying the penalty of contraband further than it has been ever carried by this or the Superior Court. If the capture had been made a day before, that is, before the alteration of the course, it might have been different; but however the variation has happened, I am disposed to hold that the parties are entitled to the benefit of it; and that under that variation the question of contraband does not at all arise. I shall decree restitution."

Note.—This decision has often been quoted to support the view that Lord Stowell condemned the application of the doctrine of continuous voyage to the carriage of contraband of war. But Professor Westlake has pointed out that what he said about contraband being taken in the actual prosecution of the voyage to the enemy port, referred to the point that proceedings cannot be taken on the return voyage. The rules of the Declaration of London now allows capture of absolute contraband if the cargo is destined for the enemy country though the vessel is bound for a neutral port; but for conditional contraband the vessel must be taken *in delicto*.

For the origin of the rule as to continuous voyage *see* p. 237.

THE "PETERHOFF."

Supreme Court of the United States, 1866.
5 Wallace, 28, 58.

Contraband goods actually destined for the use of the enemy's forces may be confiscated though the ship on which they are placed is immediately bound for a neutral port.

Case.—This was the case of an English vessel seized on a journey to Matamoros, a Mexican port, during the American

Civil War. Matamoros was close to the confederate territory, and the cargo of the vessel consisted partly of goods useful in war. The Court condemned the goods and the vessel, on the ground that the goods were contraband.

Judgment.—"The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes.

"Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

"A considerable portion of the cargo of the *Peterhoff* was of the third class, and need not be further referred to.

"A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the invoices as 'men's army bluchers,' 'artillery boots,' and 'Government regulation grey blankets.' These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army.

"It is true that even these goods, if really intended for sale in the market of Matamoros, would be free of liability; for

contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock-in-trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

"And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not.

"The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband and articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoros and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture, though primarily destined to Matamoros.

"We are obliged to conclude that the portion of the cargo which we have characterised as contraband must be condemned."

Note.—Great outcry was raised at the time to the decision of the American prize-court in this and similar cases on the ground that the "Guesses at Truth" which were made as to the ultimate destination of neutral cargoes were unwarranted by International Law. But practice has developed along the lines of allowing capture of absolute contraband when the ultimate destination is suspected to be a belligerent country (*see note above*).

Contraband Trade.

Cf. Oppenheim, ii. s. 398; Lawrence, 254; Hall, p. 663.

EX PARTE CHAVASSE, IN RE GRAZEBROOK, 1865.

34 L.J. N.S., Bankruptcy, 17.

Trade in contraband articles by a neutral is lawful.

Case.—Chavasse and Grazebrook went into partnership in the furnishing of contraband articles to the Confederacy. Both parties became bankrupt, and the assignees of Chavasse presented a petition to have the proceeds of these transactions apportioned, Chavasse never having received anything from them. This petition was dismissed with costs on the ground of the illegality of the contract. An appeal was allowed, the Lord Chancellor considering that there was a valid partnership.

Judgment.—Lord Westbury in his judgment said:

"But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful and capable of being prohibited by both or either of the belligerents. All that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent Power to whose country the cargo is destined."

In the American case of *Seton* v. *Low*, 1799 (1 Johnson 1), Kent, J., declared likewise that a trade by a neutral in contraband goods is a lawful trade and an insurance contract on that trading is valid. In the course of his judgment he said:

"On the first point, I am of opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported, by the positive law of the country, is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law (and which, so far as it concerns the

present question, is expressly incorporated into our treaty of commerce with Great Britain) contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force, but the fact is that the law of nations does not declare the trade to be unlawful. It only authorises the seizure of the contraband articles by the belligerent Powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet, at the same time, from the law of necessity, as Vattel observes, the Powers at war have a right to seize and confiscate the contraband goods, and this they may do from the principle of self-defence. The right of the hostile Power to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the effect of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral in articles contraband of war is, therefore, a lawful trade, though a trade, from necessity, subject to inconvenience and loss."

(B) Blockade.

Cf. Oppenheim, vol. ii. pp. 368–388; Lawrence, 246–252; Hall, p. 629 ff.; Westlake, vol. ii. 230 ff.

THE "FRANCISKA."

Spinks Prize Cases 115 and 10 Moore, P.C. 50.

Blockade when properly notified is a legitimate interference with neutral trade by a belligerent, and it may be set up without a formal declaration to the neutral Powers if its existence is in fact notified to neutral vessels and the blockade is not more extensive than the notice.

Case.—On April 5, 1854, the commander of the Baltic fleet blockaded, *de facto*, the coast of Courland, but his notice to the British Ministers, including the British Minister at Copenhagen,

was of vague character, and the impression was that all the Russian ports in the Baltic were blockaded. The British Government also on that date issued an order in Council, giving permission up to May 15, for Russian vessels to discharge their cargoes from Russian ports in the Baltic and White Sea to their port of destination, even though those ports were in a state of blockade. A similar permission was granted by the French Government. And the Russian Government by a Ukase allowed the same indulgence to English and French ships. On May 14, 1854, a neutral vessel, under Danish colours, sailed from Copenhagen for Riga, and was captured off Riga by an English ship, for a breach of the blockade of that port. From Dr. Lushington's decree of condemnation an appeal was taken to the Privy Council. . . .

Judgment.—"The right of blockade is founded not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of the belligerents during war all the trade which was open to him in time of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, viz. that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.

"The notice of the blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly, a neutral is at liberty to disregard such notice, and is not liable to the penalties attending a breach of blockade, for afterwards attempting to enter the port which really is blockaded.

". . . Notice has been imputed to the claimant in the court

below from the alleged notoriety of the blockade on May 14 at Elsinore, where the ship touched, and at Copenhagen, where the owner resided. . . . The fact of knowledge is capable of much easier proof in the case of ingress than in the cae of egress; but when once the fact is clearly proved, the consequences must be the same. The reasoning of the learned judge of the court below in this case and the language of Lord Stowell in *The Adelaide* reported in the note to *The Neptunus*, 2 Rob. 111, and *The Hurtig Hane*, 3 Rob. 324, are conclusive upon this point.

"But while their lordships are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron, yet the fact, with notice of which the individual is to be fixed, must be one which admits of no reasonable doubt. 'Any communication which brings it to the knowledge of the party,' to use the language of Lord Stowell in *The Rolla*, 6 Rob. 367, 'in a way which could leave no doubt in his mind as to the authenticity of the information.'

"Again, the notice to be inferred from general notoriety, must be of such a character that if conveyed by a distinct intimation from a competent authority it would have been binding. The notice cannot be more effectual because its existence is presumed, than it would be if it were directly established in evidence. The notice to be inferred from the acts of a belligerent, which is to supply the place of a public notification, or of a particular warning, must be such as, if given in the form of a public notification, or of a particular warning, would have been legal and effectual."

Note.—The principle that definite notice of a *de facto* blockade is sufficient has recently been affirmed in the case of *The Adula* (176 U.S. 361) where an English vessel was condemned for breach of blockade of a Cuban port during the Spanish-American War, of which it had received notice from an American ship of war. For the changes made by the Declaration of London in the Law of Blockade *see note* p. 229.

THE "FREDERICK MOLKE," 1798.

1 C. Rob. 85.

A vessel coming out of a blockaded port with a cargo is primâ facie liable to seizure. If the cargo was taken on board after the commencement of the blockade, ship and cargo will be liable to condemnation.

Case.—This was the case of a Danish vessel taken coming out of Havre, on August 18, 1798, and bound on a voyage from Havre to the coast of Africa, with a miscellaneous cargo.

Judgment (Sir W. Scott).—"In this case a claim has been given for the ship and cargo, as the property of the same person, a Danish merchant of Christiania.

"Several questions have been raised respecting the property—the previous conduct of the vessel—the legality of this sort of trade, and the actual violation of a blockade. I shall first consider the last question, because if that is determined against the claimant, it will render a discussion of all other points unnecessary.

"First, then, as to the blockade, these facts appear in the depositions of the master: 'That on his former voyage he cleared out from Lisbon to Copenhagen, but was really destined to Havre, if he could escape English cruisers; that he was warned by an English frigate, *The Diamond*, off Havre, not to go into Havre, as there were two or three ships that would stop him; but that he slipped in at night and delivered his cargo.' It is therefore sufficiently proved that there were ships on that station to prevent ingress, and that the master knowingly evaded the blockade; for that a legal blockade did exist, results necessarily from these facts, as nothing further is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice or prohibition given to the party.

"But it is still further material that this blockade certainly continued till the ship came out again. It is notorious indeed that

Havre was blockaded for some time; and although the blockade varied occasionally, it still continued; for it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind (if the suspension, and the reason of the suspension are known), that will be sufficient in law to remove a blockade.

"It is said this was a new transaction, and that we have no right to look back to the delinquency of the former voyage; and a reference is made on this point to the law of contraband, where the penalty does not attach on the returned voyage: but is there that analogy between the two cases which should make the law of one necessarily, or in reason applicable to the other also? I cannot think there is such an affinity between them; there is this essential difference, that in contraband the offence is deposited with the cargo; whilst in such a case as this, it is continued and renewed in the subsequent conduct of the ship.

"For what is the object of blockade? Not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place. I must therefore consider the act of egress to be as culpable as the act of ingress, and the vessel on her return still liable to seizure and confiscation.

"There may indeed be cases of innocent egress, where vessels have gone in before the blockade; and under such circumstances it could not be maintained, and they might not be at liberty to retire. But even then a question might arise, if it were attempted to carry out a cargo; for that would, as I have before stated, contravene one of the chief purposes of blockade.

"A ship then, in all cases, coming out of a blockaded port, is in the first instance liable to seizure; and to obtain release, the claimant will be required to give a very satisfactory proof of the innocency of his intention. In the present case, the ingress was criminal and the egress was criminal; and I am decidedly of opinion that both ship and cargo, being the property of the same person, are subject to confiscation."

Note.—If, however, a ship carries goods brought from a blockaded

port by means of interior canal navigation to a neutral port which is open, it is not liable to seizure for breach of blockade; because a blockade cannot extend beyond the ports and coasts belonging to or occupied by an enemy, and the ship can only be captured if it comes from the blockaded region (*The Stert*, 4 C. Rob. 65).

THE "BETSEY," 1798.

1 C. Rob. 93.

A declaration of blockade by a commander without an actual investment will not constitute blockade.

Case.—This was a case of a ship and cargo taken by the English at the capture of Guadaloupe, April 13, 1774, and retaken, together with that island, by the French in June following. The ship was claimed for Mr. Patterson, of Baltimore; and the cargo, as American property. The captors, being served with a monition to proceed to adjudication, appeared under protest; and the cause now came on upon the question, whether the claimants were entitled to demand of the first British captors restitution in value for the property which had been passed from them to the French recaptors? The first seizure was defended on a suggestion that the *Betsey* had broken the blockade at Guadaloupe.

Judgment (Sir W. Scott).—"This is a case which it will be proper to consider under two heads. I shall first dispose of the question of blockade; and then proceed to inquire on whom the loss of the recapture by the French ought to fall under all the circumstances of the case.

"On the question of blockade three things must be proved: 1st, the existence of an actual blockade; 2ndly, the knowledge of the party; and 3rdly, some act of violation, either by going in or by coming out with a cargo laden after the commencement of blockade. The time of shipment would on this last point be very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property, yet after the commencement of a block-

ade a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade a neutral is no longer at liberty to make any purchase in that port.

"It is necessary, however, that the evidence of a blockade should be clear and decisive; but in this case there is only an affidavit of one of the captors, and the account which is there given is, 'that on the arrival of the British forces in the West Indies a proclamation issued, inviting the inhabitants of Martinique, St. Lucie, and Guadaloupe to put themselves under the protection of the English: that on a refusal, hostile operations were commenced against them all.' But it cannot be meant that they began immediately against all at once, for it is notorious that they were directed against them separately and in succession. It is further stated, 'that in January 1794 (but without any more precise date), Guadaloupe was summoned, and was then put into a state of complete investment and blockade.'

"The word 'complete' is a word of great energy; and we might expect from it to find that a number of vessels were stationed round the entrance of the port to cut off all communication; but from the protest I perceive that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated, 'that on January 1, after a general proclamation to the French islands, they were put into a state of complete blockade.' It is a term, therefore, which was applied to all those islands at the same time under the first proclamation.

"The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade. It is clear, indeed, that it could not in reason be sufficient to produce the effect which the captors erroneously ascribe to it; but from the misapplication of these phrases in one instance I learn that we must not give too much weight to the use of them on this occasion, and from the generality of these expressions I think we must infer that there was not that actual blockade which the law is now distinctly understood to require.

"But it is attempted to raise other inferences on this point

from the manner in which the master speaks of the difficulty and danger of entering, and from the declaration of the municipality of Guadaloupe, which states 'the island to have been in a state of siege.' It is evident that the American master speaks only of the difficulty of avoiding the English cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of France which is sometimes applied to domestic disturbances; and certainly is not so intelligible as to justify me in concluding that the island was in that state of investment from a foreign enemy which we require to constitute a blockade. I cannot, therefore, lay it down that a blockade did exist till the operations of the forces were actually directed against Guadaloupe in April.

"It would be necessary for me, however, to go much further, and to say that I am satisfied also that the parties had knowledge of it; but this is expressly denied by the master. He went in without obstruction. Mr. Incledon's statement of his belief of the notoriety of the blockade is not such evidence as will alone be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in. I shall therefore dismiss this part of the case."

Note.—Blockade is dealt with by the Declaration of London (Articles 1–21) which in great part enact the existing British practice. Certain modifications however are introduced as to the necessity of declaration and notification of blockade; and a vessel which has broken blockade is liable to capture only so long as she is pursued by a ship of the blockading force.

THE "HELEN," 1865.

L.R. 1, Admiralty and Ecclesiastical, 1.

A breach of blockade is not an offence against the laws of the country of the neutral owner or master. The only penalty for engaging in such trade is the liability to capture and condemnation by the belligerent.

Case.—In this case, the master sued for wages upon an agreement entered into between himself and the defendants, the owners of the *Helen*.

The defendants alleged that "the agreement was made and entered into for the purpose of running the blockade of the Southern ports of the United States of America, or one of them, and was and is contrary to law, and cannot be recognised or enforced by this Honourable Court."

Judgment (Dr. Lushington).—"This is a motion by the plaintiff to reject the fourth article of the defendant's answer. The parties in this cause are John Andrews Wardell, formerly the master of the *Helen*, plaintiff, and the Albion Trading Company, the owners of the ship, defendants. The master sues for wages (with certain premiums added), alleged to have been earned between July 1864 and March 1865. The answer states that according to the agreement as set forth by the defendants, the plaintiff has been paid all that was due to him. This part of the answer is not objected to. The fourth and last article is the one objected to. It alleges that the agreement was entered into for the purpose of breaking the blockade of the Southern States of America; that such an agreement is contrary to law, and cannot be enforced by this Court. In the course of the argument, the judgment in *Ex parte Chavasse re Grazebrook*, 34 L. J. (Bkr.) 17, was cited as governing the case; a judgment recently delivered by Lord Westbury whilst he was Lord Chancellor. The law there laid down is briefly stated, that a contract of partnership in blockade-running is not contrary to the municipal law of this

country; and by the decree the partnership was declared valid, and the accounts ordered accordingly. It was admitted that this decision is directly applicable to the present case, a suit to recover wages according to a contract with respect to an intended adventure to break the blockade.

"It is, I conceive, admitted on all hands, that the Court must enforce the agreement with the master, unless it is satisfied that such agreement is illegal by the municipal law of Great Britain. In order to prove this proposition, the defendants say that the agreement to break the blockade by a neutral ship is, on the part of all persons concerned, illegal according to the law of nations, and that the law of nations is a part of the municipal law of the land—*ergo*, this contract was illegal by municpial law.

"Now a good deal may depend on the sense in which the word 'illegal' is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal so far, that if carried out, they would lead to acts which might, under certain circumstances, expose the parties concerned to such penal consequences as are sanctioned by international law, for breach of blockade, or for the carrying of contraband. If so, the illegality is one of a limited character. For instance suppose a vessel after breaking the blockade completes her voyage home, and is afterwards seized on another voyage, the original taint of illegality—whatever it may have been—is purged, and the ship cannot be condemned; yet if the voyage was, *ab initio*, wholly and absolutely illegal, both by the law of nations and the municipal law, why should its successful termination purge the offence? Let me consider the relative situation of the parties. A neutral country has a right to trade with all other countries in time of peace. One of these countries becomes a belligerent, and is blockaded. Why should the right of the neutral be affected by the acts of the other belligerent? The answer of the blockading power is: 'Mine is a just and necessary war,' a matter which, in ordinary cases, the neutral cannot question, 'I must seize

contraband, I must enforce blockade, to carry on the war.' In this state of things there has been a long and admitted usage on the part of all civilised states—a concession by both parties, the belligerent and the neutral—a universal usage which constitutes the law of nations. It is only with reference to this usage that the belligerent can interfere with the neutral. Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do.

"What is the usage as to blockade? There are several conditions to be observed in order to justify the seizure of a ship for breach of blockade. The blockade must be effectual and (save accidental interruption by weather) constantly enforced. The neutral vessel must be taken *in delicto*. The blockade must be enforced against all nations alike, including the belligerent one. When all the necessary conditions are satisfied, then, by the usage of nations, the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral State. It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral State, still less that the neutral State should be bound to prevent them; the belligerent has not a shadow of right to require more than universal usage has given him, and has no pretence to say to the nuetral: 'You shall help me to enforce my belligerent right by curtailing you own freedom of commerce, and making that illegal by your own law which was not so before.' This doctrine is not inconsistent with the maxim that the law of nations is part of the law of the land. The fact is, the law of nations has never declared that a neutral State is bound to impede or diminish its own trade by municipal restriction. Our own Foreign Enlistment Act is itself a proof that to constitute transactions between British subjects, when neutral and belligerents, a municipal offence by the law of Great Britain, a statute was necessary. If the acts mentioned in that statute were in themselves a violation of municipal law, why any statute at all? I am now speaking of

fitting out ships of war, not of levying soldiers, which is altogether a different matter. Then how stands the case upon authority? I may here say, that in principle, there is no essential difference whether the question of breach of municipal law is raised with regard to contraband or breach of blockade.

"Mr. Duer, 'Marine Insurance,' vol. i., Lect. VII., is the only text-writer who maintains an opinion contrary to what I have stated to be the law. He maintains it with much ability and acuteness, but he stands alone. He himself admits that an insurance of a contraband voyage is no offence against municipal law of a neutral country, according to the practice of all the principal States of continental Europe. In the American courts the question has been more than once agitated, but with the same result. In the case of the *Santissima Trinidad*, 7 Wheat. 340, Mr. Justice Story says: 'It is apparent that, though equipped as a vessel of war, she (the *Independencia*) was sent to Buenos Ayres on a commercial adventure, contraband indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our law or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign parts for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation.'"

Note.—For the corresponding decision on the nature of contraband trading which is referred to in the judgment *see Ex parte Chavasse* above, *p.* 221.

C. Rule of the War of 1756.

Cf. Oppenheim, ii. s. 289; Lawrence, 257; Hall, p. 632 ff. Westlake, vol. ii. p. 257.

THE "IMMANUEL," 1799.

2 C. Robinson, 186.

Neutrals will not be permitted to engage in a trade, during a war, from which they were excluded in time of peace. This applies especially to the colonial trade.

Case.—This was the case of an asserted Hamburg ship, taken August 14, 1799, when England was at war with France, on a voyage from Hamburg to St. Domingo, having in her voyage touched at Bordeaux, where she sold part of the goods brought from Hamburg, and took a quantity of iron stores and other articles for St. Domingo. A question was first raised as to the property of the ship and cargo; and further supposing it to be neutral property, whether a trade from the mother country of France to St. Domingo, a French Colony, was not an illegal trade, and such as would render the property of neutrals engaged in it liable to be considered as the property of enemies, and subject to confiscation?

Judgment (Sir W. Scott).—. . . "Upon the breaking out of war, it is the right of neutrals to carry on their *accustomed trade*, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case however they are entitled to freight and expenses. I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly

suspected of doing it; these inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable.

"Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking.

"What is the colonial trade *generally speaking*? It is a trade generally shut up to the exclusive use of the mother country, to which the colony belongs, and this to a double use—that, of supplying a market for the consumption of native commodities, and the other of furnishing to the mother country the peculiar commodities of the colonial regions; to these two purposes of the mother country, the general policy respecting colonies belonging to the States of Europe, has restricted them. With respect to other countries, generally speaking, the colony has no existence; it is possible that indirectly and remotely such colonies may affect the commerce of other countries. . . .

"Upon the interruption of a war, what are the rights of belligerents and neutrals respectively regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possesson of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: Such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended they must fall to the belligerent of course—and if the belligerent chooses to apply his means to such an object, what right has a third party,

perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent; and say, 'True it is, you have, by force of arms forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we have never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening, which the prevalence of your arms alone has affected; supplies shall be sent and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others.'

"Upon these grounds, it cannot be contended to be a *right* of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war, it is a measure not of French councils, but of British force."

Note.—This principle is not affected in any way by anything in the Declaration of London. The same rule applies also to neutral vessels engaging in the coasting trade of a belligerent which is usually reserved for national ships. *Cf.* the *Emanuel* (1 C. Rob. 296). In the Russo-Japanese War an American steamship with an English cargo was condemned by the Japanese Court for trading with certain Russian islands in a district closed to foreign vessels in time of peace.—*The Montana. Takahashi*, Int. Law, 188.

Cf. Oppenheim, vol. ii. s. 400 ; Hall, p. 667 ; Westlake, ii. p. 252.

THE "WILLIAM," 1806.

5 C. Robinson, 385.

By the "Rule of the War of 1756," neutrals were not permitted to engage in the direct trade between the enemy and his colonies. And the mere touching at a neutral port to avoid this rule did not make the voyage lawful.

Case.—This was a question on the continuity of a voyage in the colonial trade of the enemy, brought by appeal from the Vice-Admiralty Court at Halifax, where the ship and cargo, taken on a destination to Bilbao in Spain, and claimed on behalf of Messrs. W. and N. Hooper of Marblehead in the state of Massachusetts, had been condemned July 17, 1800.

Among the papers was a certificate from the collector of the customs, "that this vessel had entered and landed a cargo of cocoa belonging to Messrs. W. and N. Hooper, and that the duties had been secured agreeable to law, and that the said cargo had been reshipped on board this bessel bound for Bilbao."

Judgment (Sir William Grant).—"The question in this case is, whether that part of the cargo which has been the subject of further proof, and which, it is admitted, was at the time of the capture going to Spain, is to be considered as coming directly from Laguira within the meaning of His Majesty's instructions. According to our understanding of the law, it is only from those instructions that neutrals derive any right of carrying on with the colonies of our enemies, in time of war, a trade from which they were excluded in time of peace. The instructions had not permitted the direct trade between the hostile colony and its mother country, but had, on the contrary ordered all vessels engaged in it to be brought in for lawful adjudication ; and what the present claimants accordingly maintain is, not that they could carry the produce of Laguira directly to Spain ; but that they

were not so carrying the cargo in question, inasmuch as the voyage in which it was taken was a voyage from North America, and not directly from a colony of Spain.

"What then, with reference to this subject, is to be considered as a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and shortest course, in which the voyage could be performed, would change its denomination, and make it cease to be a direct one within the intendment of the instructions.

"Nothing can depend on the degree or the deviation—whether it be of more or fewer leagues, whether towards the coast of Africa or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change, because a party may choose arbitrarily by the ship's papers, or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done: Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process?

"Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible, but when it is discovered, it is according to

the truth and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence, to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be found to accept as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them, The landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires, *are necessary ingredients* in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies*. which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue, the appearance of being broken by an importation, which he has resolved not really to make.

"If the continuity of the voyage remains unbroken, it is immaterial whether it be by the prosecution of an original purpose to continue it, as in the case of the *Essex*, or, as in this case, by the relinquishment of an original purpose to have brought it to a termination in America. It can never be contended that an intention to import once entertained is equivalent to importation. And it would be a contradiction in terms to say that by acts done after the original intention has been abandoned, such original intention has been carried into execution. Why should

a cargo, which there was to be no attempt to sell in America, have been entered at an American custom-house, and voluntarily subjected to the payment of any, even the most trifling duty? Not because importation was, or in such a case could be intended, but because it was thought expedient that something should be done, which in a British Prize Court might pass for importation. Indeed, the claimants seem to have conceived that the inquiry to be made here was, *not* whether the importation was real or pretended, but whether the pretence had assumed a particular form, and was accompanied with certain circumstances which by some positive rule were, in all cases, to stand for importation, or to be conclusive evidence of it. . . .

"But supposing that we had uniformly held that payment of the import duties furnished conclusive evidence of importation, would there have been any inconsistency or contradiction in holding that the mere act of giving a bond for an amount of duties, of which only a very insignificant part was ever to be paid, could not have the same effect as the actual payment of such amount? The further proof in the *Essex* first brought distinctly before us the real state of the fact in this particular. It has been already mentioned that we had called for an account of the drawbacks, if any, that had been received. This produced the information that although the duties secured amounted to 5278 dollars, yet a debenture was immediately afterwards given for no less than 5080 dollars; so that on that valuable cargo no more than 198 dollars would be ultimately payable, which sum is said to be more than compensated for the advantage arising from the negotiability of the debenture. . . .

"The consequence is, that the voyage was illegal, and that the sentence of condemnation must be affirmed."

Note.—The application of the rule as to continuous vovage to cases of contraband has been considered above (*see* p. 218).

D. Un-neutral Service.

Cf. Oppenheim, ii. 407–413; Lawrence, 260–262; Hall, p. 676; Westlake, ii. p. 263.

"THE ATALANTA."

High Court of Admiralty, 1808.
6 C. Robinson, 440.

Carrying despatches from the Governor of an enemy's colony to the Minister of Marine is a cause of confiscation of the ship.

Case.—This was a case of a Bremen ship and cargo, captured on a voyage from Batavia to Bremen, on July 14, 1797, having come last from the Isle of France, where a packet containing despatches from the Government of the Isle of France to the Minister of Marine, at Paris, was taken on board by the master and one of the supercargoes, and was afterwards found concealed in the possession of the second supercargo, under circumstances detailed in the judgment.

Judgment (Sir W. Scott).—"The question then is, what are the legal consequences attaching on such a criminal act?—for that it is criminal and most noxious is scarcely denied. What might be the consequences of a simple transmission of despatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a fraudulent case. That the simple carrying of despatches, between the colonies and the Mother Countries of the enemy, is a service highly injurious to the other belligerent, is most obvious. In the present state of the world, in the hostilities of European Powers, it is an object of great importance to preserve the connection between the Mother Country and her colonies; and to interrupt that connection, on the part of the other belligerent, is one of the most energetic operations of war. The importance of keeping

up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance, also, and support, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these despatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered in the contemplation of law, as an object of hostility, although not produced by operations strictly military. How is this intercourse with the Mother Country kept up in time of peace? by ships of war or by packets in the service of the State. If a war intervenes and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy-State, and is justly to be considered in that character. Nor let it be supposed, that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerent in that quarter of the world. It is true, as it has been said, that *one ball* might take off a *Charles* XII, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events it is a sort of evanescent quantity of which no account is taken; and the practice has been accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of despatches is very different; it is impossible to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, which, in whatever degree

it exists, can only be considered in one character, as an act of the most noxious and hostile nature.

"This country, which, however much its practice may be misrepresented by foreign writers, and sometimes by our own, has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But the offence of carrying despatches is, it has been observed, greater. To talk of the confiscation of the noxious article, the despatches, which constitutes the penalty in contraband, would be ridiculous. There would be *no* freight dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle.

"Then comes the other question, whether the penalty is not also to be extended further, to the cargo, being the property of the same proprietors—not merely *ob continentiam delicti*, but likewise because the representatives of the owners of the cargo, are directly involved in the knowledge and conduct of this guilty transaction? On the circumstances of the present case I have to observe, that the offence is as much the act of those who are the constituted agents of the cargo, as of the master, who is the agent of the ship. The general rule of law is, that, where a party has been guilty of an interposition in the war, and is taken *in delicto*, he is not entitled to the aid of the Court, to obtain the restitution of any part of his property involved in the same transaction. It is said that the term 'interposition in the war' is a very general term and not to be loosely applied. I am of opinion that this is an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud, and marked with every species of malignant conduct. In such a case I feel myself bound, not only by the general rule, *ob continentiam delicti*, but by the direct participation of guilt in the agents of the cargo. Their own immediate conduct not only excludes all favourable distinction, but makes them pre-eminently

the object of just punishment. The conclusion therefore is, that I must pronounce the ship and cargo subject to condemnation."

Note.—A Convention drawn up at the Hague in 1907 has secured immunity from capture for mail-bags carried on neutral vessels, so that enemy despatches sent by ordinary post are to-day exempt from belligerent interference. But if a vessel is especially chartered to carry despatches to or from the enemy country for the enemy force, or if it uses its wireless telegraph installation for the purpose of giving information to the enemy, it will be liable to condemnation in accordance both with the old law and the Declaration of London (*see* p. 247).

THE "OROZEMBO," 1807.

6 C. Robinson, 430.

A neutral vessel chartered by the enemy to convey military persons is subject to confiscation as engaged in an unlawful commerce.

Case.—This was a case of an American vessel that had been ostensibly chartered by a merchant at Lisbon "to proceed in ballast to Macao, and there to take a cargo to America," but which had been afterwards, by his directions, fitted up for the reception of three military officers of distinction and two persons in civil departments in the Government of Batavia, who had come from Holland to take their passage to Batavia, under the appointment of the Government of Holland. Great Britain at the time was at war with France and Holland.

Judgment (Sir W. Scott).—"This is the case of an admitted American vessel; but the title to restitution is impugned, on the ground of its having been employed, at the time of the capture, in the service of the enemy, in transporting military persons first to Macao and ultimately to Batavia. That a vessel hired by the enemy for the conveyance of military persons is to be considered as a transport subject to condemnation, has been in a recent case held by this Court, and on other occasions.

"What is the number of military persons that shall constitute

such a case, it may be difficult to define. In the former case there were many, in the present they are much fewer in number; but I accede to what has been observed in argument, that number alone is an insignificant circumstance in the considerations, on which the principle of law on this subject is built, since fewer persons of high quality and character may be of more importance, than a greater number of persons of lower condition. To send out one veteran general of France to take the command of the forces at Batavia, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the belligerent has a stronger right to prevent and punish. In this instance the military persons are three, and there are, besides, two other persons who were going to be employed in civil capacities in the Government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me, on principle, to be but reasonable that, whenever it is of sufficient importance to the enemy that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations.

"It has been argued, that the master was ignorant of the character of the service on which he was engaged, and that, in order to support the penalty, it would be necessary that there should be some proof of delinquency in him, or his owner. But, I conceive, that is *not* necessary; it will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. In the case of the Swedish vessel there was no *mens rea* in the owner, or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion, put upon him by the officers of the French Government, and, so far as intention alone is considered, perfectly innocent. In the same manner, in cases of *bonâ fide* ignorance, there may be no actual delinquency, but if the service is injurious, that

will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penal penaty of confiscation. If imposition has been practised, it operates as force ; and if redress in the way of indemnification is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger. If, therefore, it was the most innocent case on the part of the master, if there was nothing whatever to affect him with privity, the whole amount of this argument would be that he must seek *his* redress against the freighter ; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the knowledge and privity of the immediate offender.

" It has been argued throughout, as if the ignorance of the master *alone* would be sufficient to exempt the property of the owner from confiscation. But may there not be other persons, besides the master, whose knowledge and privity would carry with it the same consequences ?

" Suppose the owner himself had knowledge of the engagement, would not that produce the *mens rea*, if such a thing is necessary ? or if those who had been employed to act for the owner, had thought fit to engage the ship in a service of this nature, keeping the master in profound ignorance, would it not be just as effectual, if the *mens rea* is necessary, that it should reside in those persons, as in the owner ?

" The observations which I shall have occasion to make on the remaining parts of this case will, perhaps, appear to justify such a supposition, either that the owner himself, or those who acted for him in Lisbon or in Holland, were connusant of the nature of the whole transaction. But I will first state *distinctly*, that the principle on which I determine this case is, that the carrying military persons to the colony of an enemy, who are there to take on them the exercise of their military functions, will lead to condemnation, and that the Court is not to scan with minute arithmetic the number of persons that are so carried. If it has appeared to be of sufficient importance to the Government of

the enemy to send them, it must be enough to put the adverse Government on the exercise of their right of prevention; and the ignorance of the master can afford no ground of exculpation in favour of the owner, who must seek his remedy in cases of deception, as well as of force, against those who have imposed upon him."

Note.—The Declaration of London contains three articles dealing with "Unneutral Service" [Art. 45–47). A vessel is rendered liable to condemnation if she is on a voyage specially undertaken with a view to the transport of individual passengers, who form part of the enemy's force, or if to the knowledge of the owner, or charterer, or master, though in the course of a regular voyage she is actually transporting a number of the enemy's force. If she is exclusively engaged in the transport of enemy troops she may be treated as an enemy vessel, and the cargo as well as the ship may be confiscated.

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